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In the Supreme Court of the United States

January Term, 1975
No. 74-926

CITY OF PITTSBURGH,
Petitioner

vs.

PUBLIC PARKING AUTHORITY OF PITTSBURGH, ASSOCIATED DRY GOODS CORPORATION, a Virginia Corporation, Successors to Joseph Horne Co., a Pennsylvania Corporation, GIMBEL BROTHERS, INC., a New York Corporation, THE MAY DEPARTMENT STORES COMPANY, a New York Corporation, and PARKING SERVICE CORPORATION, a Pennsylvania Corporation,
Respondents

PETITION OF THE CITY OF PITTSBURGH FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

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Petition

IN THE SUPREME COURT OF THE UNITED STATES

January Term, 1975
No.

City of Pittsburgh,

Petitioner,

v.

Public Parking Authority of Pittsburgh, Associated Dry Goods Corporation, a Virginia Corporation, Successors to Joseph Horne Co., a Pennsylvania Corporation, Gimbel Brothers, Inc., a New York Corporation, The May Department Stores Company, a New York Corporation, and Parking Service Corporation, a Pennsylvania Corporation,

Respondents

PETITION OF THE CITY OF PITTSBURGH FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

To: The Honorable Warren E. Burger, Chief Justice of the United States, and the Associated Justices of the Supreme Court of the United States:

The petitioner, the City of Pittsburgh, respectfully prays that a writ of certiorari issue to review the order of the Commonwealth Court of Pennsylvania entered in the above case January 14, 1974, a petition for allowance of appeal having been denied by the Supreme Court of Pennsylvania on August 13, 1974, and for reconsideration of said petition having been denied on October 31, 1974.

OPINIONS BELOW

The order of the Supreme Court of Pennsylvania dated October 31, 1974, denying reconsideration of the Petition for Allowance of Appeal, appears at page 1a of the Appendix and is unreported.

The order of the Supreme Court of Pennsylvania dated August 21, 1974, denying the Petition and Supplemental Petition for Allowance of Appeal appears at page 3a of the Appendix and is unreported.

The order and opinion of the Commonwealth Court of Pennsylvania dated January 14, 1974, appear at page 5a of the Appendix and is reported at 11 Commonwealth Ct. 442, 314 A. 2d 887.

The opinion and order of the court en banc of the Court of Common Pleas of Allegheny County dated December 29, 1972, appear at pages 11a and 25a of the Appendix and are unreported.

The order of the Supreme Court of Pennsylvania in *C. A. McGillick et al. v. City of Pittsburgh* dated September 29, 1964, appears at page 47a of the Appendix and is reported at 415 Pa. 581, 203 A. 2d 480 (1964).

The opinion and order of the court en banc of the Court of Common Pleas of Allegheny County in *C. A. McGillick et al. v. City of Pittsburgh* dated February 26, 1964, appear at pages 26a and 47a of the Appendix and are unreported.

JURISDICTION

Petitioner seeks review of the order of the Commonwealth Court of Pennsylvania dated January 14, 1974 (A. 10a). Allowance of appeal was denied finally by the Supreme Court of Pennsylvania by order dated October 31, 1974 (A. 1a). The jurisdiction of the Supreme Court of the United States is invoked pursuant to the Act of June 25, 1948, C. 646, 62 Stat. 929, 28 U.S.C. §1257 (3).

QUESTION INVOLVED

Does the retrospective overruling by an intermediate appellate court of the Pennsylvania Supreme Court's *per curiam* affirmance of a decision (involving the same issues and parties), in reliance on which the City of Pittsburgh has imposed parking taxes for the past decade, constitute impairment of the obligation of contract in violation of article I, section 10 of the federal Constitution on the basis of the facts and circumstances of this case?

(Petitioner respectfully requests that the foregoing should be answered in the affirmative.)

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

Article I, section 10 of the federal Constitution provides, in relevant part:

> "No State shall . . . pass any ex post facto Law, or Law impairing the Obligation of Contracts. . ."

City of Pittsburgh Ordinance No. 704 of 1969 is set forth in full beginning at page 48a of the Appendix.

STATEMENT OF THE CASE

This is yet another in a series of cases[1] in which certain operators of parking lots and garages in the City of Pittsburgh have sought to invalidate the City of Pittsburgh Parking Tax, imposed at the time of this action under Ordinance No. 704 of 1969 (A. 48a)[2], herein the "Parking Tax."

The City of Pittsburgh first imposed a parking tax under Ordinance No. 434 of 1962 pursuant to authority granted by the "Tax Anything Act," June 25, 1947, P. L. 1145, 53 P.S. §6851 et seq. In every year since, a similar parking tax has been part of the Pittsburgh revenue package, enacted since 1965 pursuant to the Local Tax Enabling Act, December 31, 1965, P. L. 1257, et seq., 53 P.S. §6901 et seq., as amended, which is, in all material aspects, a reenactment of the

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[1] In *Alco Parking Corp. et al. v. City of Pittsburgh,* U.S. , 94 S. Ct. 2294 (1974), in which Parking Service Corporation, a respondent herein, was also a party, this Honorable Court held that the Parking Tax Ordinance was not confiscatory or violative of the due process clause of the federal constitution. Other cases involving the same or similar parties include *McGillick, et al. v. City of Pittsburgh,* 415 Pa. 581, 203 A. 2d 480 (1964); *University Club v. Pittsburgh,* 440 Pa. 562, 271 A. 2d 221 (1970); and *William Penn Parking Garage, Inc., et al. v. City of Pittsburgh,* 11 Commonwealth Ct. 507, 314 A. 2d 322 (1974), allocatur granted Pennsylvania Supreme Court, 3 March Term 1975.

[2] References designated by "A" are to pages of the Appendix filed herein. References designated by "R" are to pages of the Record filed in the Commonwealth Court of Pennsylvania.

earlier enabling statute. Similarly, the parking tax ordinances up to and including the one involved in the instant case have been essentially the same ordinance with the exception that Ordinance No. 674 of 1968 increased the rate of tax from 10% to 15% and Ordinance No. 704 of 1969 increased the rate from 15% to 20%.

The only major difference between the parking tax at issue herein and the original parking tax was that the "operator" upon whom the burden of the tax was placed was defined in the original ordinance to exclude the Public Parking Authority of the City of Pittsburgh. The order of the court en banc of the Allegheny County Court of Common Pleas in *McGillick et al. v. City of Pittsburgh,* supra, affirmed by the Pennsylvania Supreme Court (A. 47a), declaring the tax valid (A. 47a), specifically held that the portion of the Parking Tax Ordinance excluding the Public Parking Authority of the City of Pittsburgh (hereafter "Authority") from the term "operator" was unconstitutional. Thereafter, all parking tax ordinances have included the Authority as an "operator" in accordance with the directive of the courts.

The Authority, organized as a body corporate and politic under the Act of June 5, 1947, P. L. 458, 53 P.S. §341 et seq. (hereafter the "Parking Authority Law") to provide for the establishment and maintenance of parking facilities in Pittsburgh, has power, *inter alia,* to issue bonds. Bonds issued pursuant to the original trust indenture of October 1, 1951 (not scheduled for complete payment until 1981), are guaranteed by the full faith and credit of the City as are

those issued pursuant to subsequent trust indentures (R. 179a).

A series of agreements has been entered into by the City and the Authority to secure the City's suretyship, most notably the agreements of June 15, 1951, and September 9, 1958, which pledge the City's revenues from its parking meters to funds whose interest and principal were and are to be utilized in connection with the payment of the Authority's bonds (A. 38a). The said agreements, amended on June 11, 1963, after the imposition of the parking tax, allow the Authority to return to the City money deposited to the credit of the meter funds. Naturally, if less money is required by the City, more money is made available to the Authority for bond retirement and for the other purposes to which the Authority may apply the money. Thus, when the City had budgetary problems, i.e., during 1969 and 1970,[8] the Authority, pursuant to the agreement, returned to the City money deposited to the credit of the meter funds which otherwise would have been available for, *inter alia,* retirement of Authority bonds. Therefore, City meter funds insure against default if rentals from lessees are insufficient to pay off Authority bonds. In view of the fact that the leases entered into with Authority lessees since

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[8] In 1969 the parking tax was raised to 15% and in 1970 to 20% (p. 7, supra). To further meet the challenge of the need for revenues, the City instituted two new tax measures: Ordinance No. 675 of 1968, as amended, the Business Privilege Tax Ordinance; and Ordinance No. 676 of 1968, the Institution and Service Privilege Tax Ordinance; both effective in the tax year 1969.

the inception of the parking tax have specifically excluded from the rentals money paid to the City for parking taxes (R. 177a, 149a, 125a, 109a), the rentals are smaller than they might have been. Had the City required the proceeds from its parking meters for its own general fund in the absence, for example, of parking tax revenues, the respondents herein would have had to pay higher rentals to pick up the deficiency.[4] Yet, in the same month that the court en banc decided the *McGillick* case and required the imposition of the parking tax on the Authority, the City entered into another agreement with the Authority extending the time of the meter revenue agreement. No rentals were increased because of parking tax expectations.

In 1969 the Supreme Court of Pennsylvania decided that the lessee of a political subdivision, Allegheny County, did not have to pay parking taxes to a lesser political subdivision on parking fees received by the County at its airport facility. *County of Allegheny v. Moon Township,* 436 Pa. 54, 258 A. 2d 630. That decision was based on an exemption provision in the General County Assessment Law, May 22, 1933, P. L. 853, Article 2, §204, 72 P.S. §5020-204(g), and not on the exemption provision of the Parking Authority Law of 1947 which had been the basis of *McGillick.*

In 1972 the respondents herein, with the exception of the Authority (R. 27a), filed a complaint in equity to obtain a refund of parking taxes paid to the

[4] Also, rates have been set by the Authority Board since *McGillick* to pass on the cost of the parking tax to the parking patron.

City alleging that the *Moon Township* case, supra, exempted them from the City's parking tax ordinances. The Honorable Silvestri Silvestri denied the Authority's Petition To Strike the Public Parking Authority as a Named Plaintiff by order dated June 21, 1972 (R. 40a). On November 9, 1972, Judge Silvestri overruled the City's preliminary objections, without opinion (R. 41a).

Judge Silvestri, for the court en banc, issued an opinion and order on December 29, 1972, on the parties' cross motions for summary judgment granting respondents' motion, enjoining taxation of operations at Authority facilities and ordering refunds for the past years in an amount presently exceeding $3.75 million (A. 14a). The City filed a Petition and Supplementary Petition asking the Pennsylvania Supreme Court to assume plenary jurisdiction and to consolidate the instant case with *Alco Parking Corp. v. Pittsburgh,* supra, which were denied April 3, 1973. The appeal before Commonwealth Court resulted in an adverse opinion and order dated January 14, 1974 (A. 5a).

The City again petitioned the Pennsylvania Supreme Court for allowance of appeal setting forth as one of its grounds the error of the courts below in overruling *McGillick* retroactively, thereby altering radically contractual arrangements made in reliance upon that case. This Petition as well as the Supplemental Petition and Petition for Reconsideration were denied by the Pennsylvania Supreme Court (A. 1a, 3a) without comment on the federal constitutional issue raised by the City.

REASONS FOR GRANTING WRIT

The Retrospective Overruling by the Commonwealth Court of the Pennsylvania Supreme Court's Per Curiam Affirmance Ten Years Earlier of the City's Duty To Impose Parking Taxes on the Parking Authority Constitutes an Impairment of the Obligation of Contract in Violation of Article I, Section 10 of the Federal Constitution Inasmuch as the City Relied on Such Taxation in Entering Into Agreements With Its Bondholders, the Authority and Authority Operators During That Period

A judicial decision which changes the settled construction of a statute as declared by the highest court in the state is equivalent to a change in the statute itself which can impair the obligation of contracts made in reliance on the previous construction. *Tidal Oil Co. v. Flanagan,* 263 U.S. 444, 453-454, 44 S. Ct. 197 (1924). *A fortiori,* the Commonwealth Court decision of 1974 which reversed the duty imposed on the City by the Pennsylvania Supreme Court ten years earlier constitutes the kind of "after-the-fact" action which gives rise to the jurisdiction of this Court.

Chief Justice Taney, *Rowan v. Runnels,* 46 U.S. (5 How.) 134, 139 (1847), stated:

> "Undoubtedly this court will always feel it is bound to respect the decisions of the State

courts, and, from the time they are made, regard them as conclusive upon the construction of their own laws. ***But we ought not to give them a retroactive effect,*** and allow them to render invalid contracts entered into with citizens of other States which, in the judgment of this court, were lawfully made." (Emphasis added.)

In *Ohio Life Ins. & Trust Co. v. Debolt,* 57 U.S. (16 How.) 416 (1853), this Court applied the principle with equal force to contracts made within the state. Although the *Ohio Life Ins. & Trust Co.* case dealt with the construction of a new state constitution as opposed to the interpretation of the former consitution, Justice Taney's comments, at page 432, aptly apply to Petitioner's case:

"Indeed, the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce. . . And the sound and true rule is, that if this contract, when made, was valid by the laws of the State as then expounded by the departments of the government, and administered in its courts of justice, it is validly an obligation and cannot be impaired by any subsequent action of legislation, *or decision of its courts altering the construction of the law.*" (Emphasis added.)

In 1964 essentially the same parties (the City and the operators of parking garages in Pittsburgh) came before essentially the same courts to test the validity

of essentially the same parking tax promulgated under essentially the same enabling act, and they were told that the Parking Authority *must pay* the tax. In 1974 only the membership of the courts and the result differ, eradicating ten years of reliance on a supposedly valid tax.

This Honorable Court cited *Ohio Life & Trust Co. v. Debolt,* supra, with approval, in *Gelpcke v. Dubuque,* 68 U.S. (1 Wall.) 175 (1863), in holding that decisions made by courts to correct prior erroneous determinations can only affect the future. *Gelpcke* was the earliest of the "municipal bond" cases in which bonds issued by municipalities in reliance on judicial interpretations were invalidated by later decisions of the same courts. This Honorable Court, while giving effect to the state court's determination of constitutional infirmity, took jurisdiction on the ground that the holding could only affect the future, and not the past:

> "We shall never immolate truth, justice, and the law, because a State tribunal has erected the alter and decreed the sacrifice." p. 206.

Thus, this Court has established that the construction of state statutes and constitutional provisions by the state courts, while binding upon the highest federal court, can not be utilized to impair the obligation of a contract which was valid under the interpretation of that statute or constitutional provision formerly embraced by that state court. As Chief Justice Waite wrote, in *Douglass v. County of Pike,* 101 (11 Otto.) U. S. 677 (1879), at p. 687:

> "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment—that is, make it prospective but not retroactive."

Wolff v. New Orleans, 103 (13 Otto.) U.S. 358, 367 (1880), further enforced this Court's position by holding that an obligation of contract can be impaired if the means by which the contract at the time of its execution could be enforced (that is, by which the parties could be obliged to perform) were rendered less efficacious. *See also, Trebilcock v. Wilson,* 79 U. S. (12 Wall.) 687 (1871); *Woodruff v. Mississippi,* 162 U. S. 291, 298, 16 S. Ct. 820 (1896):

> "If by this adjudication a right possessed . . . as holders of the bonds, under the constitution and laws of the United States was necessarily denied, then this court has jurisdiction to revise the judgment on writ of error." (162 U.S. at 298)

In fact, numerous cases and commentators have pointed to reliance upon prior decisions as a basis for limiting the retroactivity of overruling decisions, indicating that the prior court decision underlay the formation of the contracts. *Gt. Northern Ry. v. Sunburst Co.,* 287 U. S. 358, 53 S. Ct. 145 (1932), is the bellweather of this Court's acceptance of "prospective overruling." The Supreme Court of Montana in 1921 had held that a shipper could recover excessive freight rates upon certain conditions. Sunburst had entered into contracts in reliance upon that decision—that it

could recover excessive amounts. The Montana Court overruled its 1921 decision but allowed Sunburst to recover because of its contracting in reliance upon the overruled decision, 91 Mont. 216, 7 P. 2d 927 (1932), and this Court affirmed.

The *Sunburst* decision, fittingly written by Mr. Justice Cardozo (a strong proponent of accommodating *stare decisis* to judicial creativity), gave rise to numerous articles dealing with prospective overruling. *See,* Fairchild, *Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or "Sunbursting",* 51 Marq. L. Rev. 254 (1967); Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling,* 42 N.Y.U. L. Rev. 631 (1967); Annotation, *Retroactive or Merely Prospective Operation of New Rule Adopted by Court in Overruling Precedent—Federal Cases.* 141 L. Ed. 2d, 992, 1004 (1966). The latter article states:

> "It has often been held or recognized that where particular persons have acted in justifiable reliance on a subsequently overruled judicial decision, such reliance constitutes a circumstance in favor of denying retroactive effect to the overruling decision. Such justifiable reliance on the basis of the prior decision may consist of . . . making and carrying out contracts."

Commentators have also recognized that *Sunburst,* supra, was not the first of the decisions of this Honorable Court to hold that the retroactive overruling of a prior decision could impair a contract as effectively as a later legislative enactment, *Sunburst* may, how-

ever, have increased the momentum toward prospective overruling in this Court. Note: *Prospective Overruling and Retroactive Application in the Federal Courts,* 71 Yale L.J. 907 (1962).

Constitutional law compels the conclusion that "impairment" as used in respect to the obligation of contracts clause means a diminution or lessening of the values of the contract rather than its complete and total invalidation. As Justice Cardozo pointed out, the courts must look to the laws in force at the time of the making of a contract in order to know the obligation of that contract. Whatever controls the judgment of the parties at the time of the bargain is the underlying reality. *W. B. Worthen Co. v. Kavanaugh,* 295 U. S. 56, 55 S. Ct. 555 (1935). In that case negotiable bonds issued by a municipal improvement district were secured by a mortgage of benefit assessments. Although no law was passed interfering with the obligation of the bonds, a statute passed after their execution diminished the remedies available in respect to the security, i.e., the time of foreclosing, penalties, etc. Though the basic obligation of the bonds was not impaired, the diminution of the security was held sufficiently damaging to constitute a violation of Article I, Section 10 of the federal constitution.

There is no doubt that a government bond is a contract between the political body which issues it and the holder. *Gelpcke v. Dubuque,* supra; *Woodruff v. Mississippi,* supra, p. 300; *Wolff v. New Orleans,* supra. During the decade 1964 to 1974, bonds issued by the City were backed, along with other security, by revenues from a parking tax validly imposed on the

Authority pursuant to the *McGillick* decision. Bonds issued by the Authority were insured by the full faith and credit of a city whose assets, at the time, included parking tax revenues. The City enacted its budgets and entered into agreements expending funds in reliance on the fact that parking tax revenues would rush to fill the vacuum created by the grant of parking meter revenues to the Authority. When City bondholders bought their bonds subsequent to the *McGillick* decision, therefore, they had a right to expect that their security would not be diminished and would include all parking taxes. Holders of bonds have a vested right to *all* security including the taxes and assessments raised for the payment of those bonds. *City of Highland Park v. Twp. of Dearborn,* 285 Mich. 440, 280 N.W. 820 (1938).

Applicable law requires that the full faith and credit of the City of Pittsburgh at the time of the issuance of the bonds be pledged to the obligation created. Section 404, Act of July 12, 1972, P. L. ("Act 185"), 53 P.S. §6780-154. As this Court held in *Hubert v. New Orleans,* 215 U.S. 170, 176, 30 S. Ct. 40 (1909):

> "A number of decisions in this court have settled the law to be that where a municipal corporation is authorized to contract, and to exercise the power of local taxation to meet its contractual engagements, this power must continue until the contracts are satisfied and that it is an impairment of the obligation of the contract to destroy or lessen the means by which it can be enforced."

Mr. Justice Brandeis, for this Court, directed a prospective application in *Brinkerhoff-Faris Co. v. Hill,* 281 U.S. 673, 50 S. Ct. 451 (1930). A trustee had brought suit in 1928 to enjoin taxes that had been assessed in 1927 on shares of stock in line with statutory procedures which had been judicially interpreted in 1922. While this Court agreed with the Missouri Supreme Court that the procedures thought sound in 1922 were no longer judicially correct, it held that the decision could not be applied retroactively to alter circumstances existing at the time of the prior judicial determination.

Yet the Commonwealth Court decision herein significantly alters the circumstances the parties here involved relied on for ten years. It deprives City of Pittsburgh bondholders of more than $4 million in security in order to bestow upon operators of Authority lots in the City (and on *no other* operators) a windfall in tax refunds even though these operators have been compensated throughout the decade by the provisions of their leases with the Parking Authority, reducing their rentals by the amount of parking tax paid (R. 177a, 149a, 125a, 109a).

The retrospective application of decision-making to render the law more favorable to certain taxpayers has been denied before, the court having concluded that retroactivity was unjust to the government and to the general taxpayers. *Shoemaker v. Cincinnati,* 68 Ohio 603, 68 N.E. 1 (1903). Still, the action of the *Shoemaker* court was merely equitable and not a matter of constitutional fiat as is the case at bar.

As this Court said in *Von Hoffman v. Quincy*, 71 U.S. (4 Wall.) 535, 554 (1866):

> "It is equally clear that where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the powers thus given cannot be withdrawn until the contract is satisfied."

The facts of the instant action require that the power to tax the Authority, having been mandated by the Court earlier, not be withdrawn to affect City revenues collected prior to the court's reversal.

First of all, the City and Authority entered into an agreement, supplementing the City's obligation to act as surety for the bonds of Authority Projects A and E, which granted the Authority parking meter revenues to which the City would otherwise be entitled (A. 38a). After the parking tax was enacted, that agreement was extended for an additional period of time. If the City had not had available to it parking tax revenues from Authority lots as security for its own bondholders, would it have forfeited its right to parking meter revenues for an additional period of time? Under the economic conditions prevailing during the ten-year period in question, it seems highly unlikely that the City could have functioned without additional revenues. If such funds had not come from the parking tax, they might have had to come from the parking meters.

Certainly the City will have to exercise its prerogative to demand emergency funds from the Author-

ity to cover the tremendous refund of millions of dollars mandated by the Commonwealth Court, as there is no provision for such a refund in the budget.

City of Covington v. Sanitation District No. 1 of Campbell and Kenton Counties, Ky., 301 S.W. 2d 885 (1957), demonstrates that the nature of a contract protected by the impairment clause is an agreement, valid at its inception, between two or more competent parties to do or not to do a particular thing. In refraining from exercising its right to its own parking meter revenues in favor of paying off Authority bondholders, the City relied on the tax revenues legally expected from the operators of the Authority lots.

Commonwealth Court's decision flies in the face of the precedents established by this Court. To invalidate *McGillick* retroactively destroys security for bondholders, agreements with the Authority, rate schedules set up for consumers (who would have paid less for ten years had it not been for *McGillick*), and all other such contracts, express or implied. For a contract which is implied *can* be impaired by retroactive action.

Fisk v. Jefferson Police Jury, 116 U.S. 131, 6 S. Ct. 329 (1885), held an implied contract was within the constitutional protection. District Attorney Fisk brought suit to recover his salary for prosecuting criminal cases for the Jefferson Police Jury. He obtained a judgment and found that no taxes had been levied with which to pay the judgment because a subsequent constitutional interpretation reduced the level of taxation power of the Police Jury which had been

permitted by a prior judicial construction. Whether or not the power legally resided in the Police Jury to impose the tax, a contract was implied by its acceptance of Fisk's services and the power to tax to satisfy that contract could not be revoked.

Arguendo, an agreement between the City and Authority bondholders can also implied. In the plurality opinion in *Alco Parking Corporation v. Pittsburgh,* supra, the court spoke of the instant case in footnote 9, 453 Pa. 245, 307 A. 2d 851, *rev'd.* U.S. , 94 S. Ct. 2294 (1974):

> "As of this writing, the Allegheny County Court of Common Pleas has ruled that the Public Parking Authority is exempt from payment of the challenged gross receipts tax. Public Parking Authority of Pittsburgh v. City of Pittsburgh, No. 687, July Term, 1972. See Allegheny County v. Moon Township, 436 Pa. 54, 258 A. 2d 630 (1969). An appeal is presently pending before the Commonwealth Court.
>
> "However, whether the Public Parking Authority is subject to the tax seems to make little difference in the context of this present dispute. Even if the Authority had to pay the tax to the City it would mean only in realty an accounting transaction, transferring dollars *from one pocket of an instrumentality of City government to another.* Thus although appellants' argument would be strengthened by the common pleas court's decision, we need not presently rest our decision upon Public Parking Authority of Pittsburgh v. City of Pittsburgh, supra." (Emphasis supplied.)

Thus, the Court apparently believed that the language of §5 of the Parking Authority Law, which identifies the Authority as an agency of the Commonwealth, is less telling than that of §8 which allows the Mayor to appoint the Authority Board. The Supreme Court of Pennsylvania seemed content to disregard the separate legal characters of the City and Authority in respect to money.

As noted elsewhere in this Petition (p. 9), the Authority Board approved rate schedules since *McGillick* with the intention of allowing the operators a recovery over and above the amount they had to pay in parking taxes. Had there been no parking tax, the rentals, unreduced by parking tax deductions, would have come out of a smaller gross income.

Not only were rates set with an eye on the parking tax, but, after *McGillick, all* contracts entered into by the Authority Board with the other respondents herein were bargained for on the basis of the Authority's duty to pay the tax. For example, the lease agreement between the Authority and Parking Service Corporation[5] was extended in 1964 on the basis that the Project A and E garages constructed prior to *McGillick* (and guaranteed to Authority bondholders by the City) had to be rehabilitated. Because the City collected parking taxes, the City could make up for the reduction in rentals shown in the 1964 contract (R. 171a) to allow such rehabilitation without endangering payments to Authority bondholders.

---

[5] Parking Service Corporation was also a respondent-appellant in *Alco Parking Corp. v. Pittsburgh*, supra. See footnote 1.

Thus, the same lease provided that operator with a deduction from rentals for all parking taxes paid to the City of Pittsburgh (R. 177a), an extension of its lucrative business arrangement, and a rate guaranteed to compensate it for any raise in the tax rate! Most other respondents had similar renegotiations of leases after the Supreme Court of Pennsylvania in *McGillick* required taxes from the Authority (R. 12a).

If the rationale of the Supreme Court of Pennsylvania is correct, the full faith and credit of the City, including all taxes levied and collected by it, is not only security for its own bondholders but also for those of the Authority. Now the Commonwealth Court not only requires the City to abide by leases which grant the respondents favorable treatment (the consideration for their payment of parking taxes) but also to pay almost $4 million to these same operators who were given deductions in rentals in the same amount.

There is no reason to favor respondents at the expense of bondholders. These operators have suffered no injury; they have been amply compensated for any burdens placed upon them by the parking tax. The City relied on *McGillick*. Society as a whole will not benefit from applying the overruling decision herein in such a manner as to further disrupt the City's budget, its bondholders' security, and its executed agreements. In the interests of substantial justice and constitutional purity, the respondents herein (and those other Authority lessees who have filed for refunds on the basis of the Commonwealth Court decision) should be denied an unexpected recovery, and the

invalidation of the parking tax with respect to the Authority, if merited, should be prospective only.

CONCLUSION

For the above reasons, it is respectfully requested that this Honorable Court issue a writ of certiorari to review the order of the Commonwealth Court of Pennsylvania.

Respectfully submitted,
GRACE S. HARRIS,
Executive Assistant City Solicitor,
Attorney for Petitioner.

LIBRARY
SUPREME COURT, U. S

FILED
JAN 27 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

January Term, 1975
No. 74-926

CITY OF PITTSBURGH,
Petitioner

vs.

PUBLIC PARKING AUTHORITY OF PITTSBURGH, ASSOCIATED DRY GOODS CORPORATION, a Virginia Corporation, Successors to Joseph Horne Co., a Pennsylvania Corporation, GIMBEL BROTHERS, INC., a New York Corporation, THE MAY DEPARTMENT STORES COMPANY, a New York Corporation, and PARKING SERVICE CORPORATION, a Pennsylvania Corporation,
Respondents

APPENDIX TO PETITION OF THE CITY OF PITTSBURGH FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

GRACE S. HARRIS,
Executive Assistant City Solicitor,
313 City-County Bldg.,
Pittsburgh, Pa. 15219,
Attorney for Petitioner.

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Order of Supreme Court

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

801 City-County Building
Pittsburgh, Pa.
15219

Sally Mrvos
Prothonotary
Irma T. Gardner
Deputy Prothonotary

November 13, 1974

Grace S. Harris, Esquire
Special Assistant City Solicitor
313 City-County Building
Pittsburgh, Pennsylvania 15219

In Re: Public Parking Authority of Pittsburgh, etc. et al. v. City of Pittsburgh

No. 569 Allocatur Docket

Dear Mrs. Harris:

This is to advise you that the Court has entered the following Order on your Petition for Reconsideration for Petition for Allowance of Appeal from the Order of Commonwealth Court at No. 97 C.D. 1973, in the above-captioned matter:

"October 31, 1974
Petition denied.
Per Curiam"

Very truly yours,
Irma T. Gardner
Deputy Prothonotary

ITG:cho
cc: Leonard Boreman, Esquire
Baskin, Boreman, Wilner,
Sachs, Gondelman & Craig
1018 Frick Bldg.
Pittsburgh, Pa. 15219
Paul H. Titus, Esquire
Kaufman & Harris
415 Oliver Bldg.
Pittsburgh, Pa. 15222

Order of Supreme Court

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT
801 City-County Building
Pittsburgh, Pa.
15219

Sally Mrvos
Prothonotary
Irma T. Gardner
Deputy Prothonotary

August 21, 1974

Grace S. Harris, Esquire
Special Assistant City Solicitor
313 City-County Building
Pittsburgh, Pa. 15219

Re: Public Parking Authority of Pittsburgh, et al v. City of Pittsburgh
No. 569 Allocatur Docket

Dear Mrs. Harris:

This is to advise you that the Court has entered the following Order on both the Petition and Supplemental Petition of the City of Pittsburgh for the allowance of appeal from the Order of the Commonwealth Court at No. 97 C.D. 1973, in the above-captioned matter:

"August 13, 1974
Petition Denied.
Per Curiam."

Very truly yours,
Irma T. Gardner
Deputy Prothonotary

ITG: ad
cc: Leonard Boreman, Esq.
Paul H. Titus, Esq.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 97 C.D. 1973

CITY OF PITTSBURGH,

Appellant

v.

PUBLIC PARKING AUTHORITY OF PITTSBURGH, ASSOCIATED DRY GOODS CORPORATION, a Virginia Corporation, Successors to Joseph Horne Co., a Pennsylvania Corporation, GIMBEL BROTHERS, INC., a New York Corporation, THE MAY DEPARTMENT STORES COMPANY, a New York Corporation, and PARKING SERVICE CORPORATION, a Pennsylvania Corporation,

Appellees

Before:

Honorable James S. Bowman, President Judge
Honorable James C. Crumlish, Jr., Judge
Honorable Harry A. Kramer, Judge
Honorable Roy Wilkinson, Jr., Judge
Honorable Glenn E. Mencer, Judge
Honorable Theodore O. Rogers, Judge
Honorable Genevieve Blatt, Judge
Argued November 7, 1973—Pittsburgh

OPINION

Opinion by Judge Rogers filed: January 14, 1974:

This is yet another case arising from the City of Pittsburgh's purpose to tax commercial parking transactions and is concerned with Ordinance No. 704 of 1969 of the City of Pittsburgh which, as it affected owners of commercial lots, was struck down by the Supreme Court in *Alco Parking Corporation v. Pittsburgh,* 453 Pa. 245, 307 A. 2d 851 (1973). The principal plaintiffs in this suit are five business corporations [1] which lease, as lessees, and operate parking lots owned by the Public Parking Authority of Pittsburgh, an Authority created under the Parking Authority Law, Act of June 5, 1947, P. L. 458, 53 P.S. §341 et seq. They seek, as did the successful parking lot operators in *Alco Parking v. Pittsburgh,* supra, an order restraining collection of the tax from them and a refund of taxes collected. [2] The court below granted the plaintiff's motion for summary judg-

[1] The corporations joined the Public Parking Authority of Pittsburgh as a plaintiff without its consent and over its objection. The court below discharged the city's rule to show cause why the Authority should not be stricken. We have concluded that the lower court correctly decided that provisions in the leases between the Authority and the other plaintiffs authorized their joinder of the Authority as a fellow plaintiff. The court's decree recognized the Authority's objection and afforded no relief against the tax to the Authority.

[2] The plaintiffs seek refunds of taxes paid during 1970 and 1971 in an amount in excess of $1,250,000.

ment, restrained the enforcement of the ordinance against the business corporation plaintiffs and directed the city to refund taxes paid by them for the years 1970 and 1971.

The issue raised by the plaintiffs and decided in their favor below is whether they are exempted by statute from the payment of this tax. Ordinance 704 was adopted by authority of The Local Tax Enabling Act.[3] It imposes a tax on all transactions of each operator with respect to each nonresidential parking place, at the rate of 20 per cent of the gross receipts from all transactions. The definition of operator is expressly inclusive of "operators on premises of Public Parking Authority of the City of Pittsburgh".

The appellees contend that they are twice statutorily exempt from this tax; first, by section 204(g) of The General County Assessment Law, Act of May 22, 1933, P. L. 853, 72 P.S. §5020-204(g) which exempts from "All . . . city . . . tax . . . [a]ll other public property used for public purposes" and second, by section 15 of the Parking Authority Law, Act of June 5, 1947, P. L. 458, 53 P.S. §355, under which the Public Parking Authority of Pittsburgh was created, declaring that "such Authorities shall not be

---

[3] Act of Dec. 31, 1965, P. L. 1257, 53 P.S. §6901. Ordinance 704 was preceded by Ordinance 434 of 1962, the legality of which was, in the main, unsuccessfully challenged in *McGillick v. City of Pittsburgh*, 415 Pa. 581, 203 A. 2d 480 (1964) and Ordinance 674 of 1968, the subject of *University Club v. Pittsburgh*, 440 Pa. 562, 271 A. 2d 221 (1970).

required to pay any taxes or assessments upon any property acquired or used by them for such purposes."

Public parking facilities operated by Authorities created under the Parking Authority Law of 1947 are public properties devoted to public use and entitled to exemption from real estate taxation. *McSorley v. Fitzgerald*, 359 Pa. 264, 59 A. 2d 142 (1948). The exemption from such taxes exists although the Authority chooses to lease its parking facilities to private parties deriving profit therefrom. *Pittsburgh Public Parking Authority v. Board of Property Assessment*, 377 Pa. 274, 105 A. 2d 165 (1954); *Price v. Philadelphia Parking Authority*, 422 Pa. 317, 221 A. 2d 138 (1966).

The city contends that the cases just cited are not controlling authority here because the instant levy is not a property tax but an excise tax upon the parking transaction. The distinction made, although difficult of clear perception, is one which the courts have found useful, usually in sustaining taxability. Hence, in *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940), a tax on parking transactions was upheld because it could be called an excise tax and thus not preempted by the state income tax, which had earlier been called a property tax. This distinction was, however, expressly held to be of no consequence in the determination of whether the parking transactions of a concessionaire of a county-owned airport were exempted from taxation by section 204(g) of The General County Assessment Law in *County of*

Allegheny v. Township of Moon, 436 Pa. 54, 258 A. 2d 630 (1969). Answering the argument that The General County Assessment Law's exemption from "all tax" of "public property used for public purposes" extended relief only from property taxes, Justice Roberts wrote:

> ". . . Unfortunately for the township, the tax-exempt status of this parking lot does not depend on the label attached to the tax.
>
> "Article IX, §1, of the Constitution of 1874, now Article VIII, §2, provides: 'The General Assembly may by law exempt from taxation: . . . (iii) That portion of public property which is actually and regularly used for public purposes . . . .' The Act of 1933, supra, provides: 'The following property shall be exempt from all . . . township . . . tax, to wit: . . . (g) All other public property used for public purposes . . . .' Neither the constitution, nor the statute, say the exemption will be only for property taxes; the statute, in fact, expressly says 'all tax.' The word 'property' is used merely to describe the locus of what the Legislature was exempting, not the type of tax it was exempting it from. There is no reason to assume that the Legislature did not fully exercise its constitutional power to exempt this property, not only from property taxes, but also from taxes on activities conducted on the property. We must therefore hold that the tax imposed here by the township on 'public property used for public purposes' is invalid."

This case is controlled by that holding. Not only do we disagree with the city's argument that the presence in the Parking Authority Law of a specific exemption for "taxes or assessments upon any property acquired or used" [4] by Authorities created under that Act renders The General County Assessment Law inapplicable, we are unable to find any real difference in meaning between the exempting provisions of the two enactments. In summary, the cases hold that public parking places created by public parking authorities, whether self-operated or leased for operation by others, are exempt from all taxes, whether levied upon them as real estate and called property taxes, or imposed upon the transactions by which they are used and called excise taxes.

The city relies principally upon *McGillick v. Pittsburgh*, 415 Pa. 581, 203 A. 2d 480 (1964), affirming per curiam an order of the Court of Common Pleas of Allegheny County, upholding the validity of Ordinance 434 of 1962, except insofar as that ordinance excluded from the definition of the word operator the Public Parking Authority of Pittsburgh. The plaintiffs in that case, owners or operators of commercial lots, contended that the ordinance violated the standard of uniformity compelled by Article 9, section 1 [5] of the Pennsylvania Constitution by excluding operators of hotel, tourist court, and trailer park parking lots, and the city and its Parking Authority. After expressing its opinion that the unifor-

[4] Act of June 5, 1947, 1 P. L. 458, §15, 53 P.S. §355.
[5] Now Article 8, section 1.

mity clause was offended by the "flat exemption" of the Authority, the county court observed: "It should be noted that the Parking Authority Law provides that 'any property' acquired or used by the Authority for its purposes is exempt from any taxes. We are of the opinion that this does not exempt taxes upon parking transactions which under this ordinance are in the nature of excise taxes as contrasted to property taxes." The city contends that the affirmance per curiam of the order which accompanied this opinion constituted a holding by the Supreme Court that section 15 of the Public Parking Authority Law provides no exemption from a tax on parking transactions. There are several reasons for disagreeing: first, the sentences relied on were dicta in the lower court's opinion; second, the affirmance by the Supreme Court of the Allegheny County Court's *order* cannot be taken as approval by the former of every statement of law propounded by the latter in support of the order; and, finally, *McGillick* preceded by five years *Allegheny v. Moon*, which latter case is on point and in direct contradiction of the principle for which the former is cited.

Order affirmed.

Theodore O. Rogers, *J.*
Certified from the Record
Jan 14 1974
Francis C. Barbush,
Chief Clerk

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

No. 687 July Term, 1972
In Equity

PUBLIC PARKING AUTHORITY
OF PITTSBURGH, etc. et al.

v.

CITY OF PITTSBURGH, a municipal corporation

OPINION

Before: Lewis, Silvestri and Dauer

Silvestri, J.

The plaintiffs filed a complaint in equity seeking to enjoin the City of Pittsburgh, herein City, from enforcing the provisions of Ordinance No. 704, being The Parking Tax Ordinance as to them and to order a refund of the taxes paid by the lessee-plaintiffs for the years 1970 and 1971, pursuant to said Ordinance, contending that the parking garages and lots owned and operated by the Authority are exempt from all taxation pursuant to the Parking Authority Law and that the tax imposed by the Ordinance is illegal, improper and unjust and in violation of Arti-

cle VIII, Section 2(a), Subsection (iii) of the Constitution of Pennsylvania as well as the Parking Authority Law and the statutes of the Commonwealth of Pennsylvania in that it is a tax imposed on public property used for public purposes.

The defendant, City, filed its answer admitting all the averments of fact of the complaint and thereupon the plaintiffs moved for summary judgment which is before us for disposition. From the complaint, answer thereto and the affidavit of the plaintiff the following facts are not in dispute.

The plaintiffs, Associated Dry Goods Corporation, Gimbel Brothers, Inc., The May Department Stores Company and Parking Services Corporation, herein referred to collectively as lessee-plaintiffs, are operators under leases of various parking garages and lots owned by the plaintiff, Public Parking Authority of Pittsburgh, herein Authority. [1]

---

[1] **Leases**

Lessee	Location	Date
Associated Dry Goods Corporation—Joseph Horne Co.	Sixth Street and Fort Duquesne Blvd.	12/1/66
Gimbel Brothers, Inc.	Smithfield Street and Liberty Ave.	4/1/64
The May Department Stores Company	Fifth Ave. at Cherry Way; Boulevard of the Allies and Cherry Way	10/1/54
Parking Service Corporation	Ninth Ave. and Penn Ave.; Bigelow Blvd.; Third Ave.	1/1/69

The lease[2] of each lessee-plaintiff contained a clause, substantially the same, as follows:

> TAXES "[lessee] will pay promptly all taxes assessed against it on account of its interest in or operations of or upon the demised premises, provided, however, that nothing contained in this section shall require [lessee] to pay any such taxes so long as it shall in good faith contest the validity thereof. [Lessee] shall have the right to contest such taxes either in its own name or in the name of the Authority as may be appropriate. [Lessee] agrees to save the Authority harmless from any and all claims, demands or liens on account of, or arising out of any of the aforesaid tax liabilities."

The Public Parking Authority of Pittsburgh is a corporation organized and existing pursuant to the Parking Authority Law, Act June 5, 1947, P. L. 458, Section 1 et seq., as amended, 53 P.S. 341 et seq.

The City, pursuant to "The Local Tax Enabling Act", Act No. 511, 1965, Dec. 31, P. L. 1257, Section 1 et seq. as amended, 53 P.S. 6901 et seq. enacted Ordinance 704, entitled "Parking Tax Ordinance", effective Feb. 1, 1970.

The Ordinance provides, as herein relevant, as follows:

---

[2] The leases are not attached to the Complaint by reason of being cumbersome but are made part of the record by the affidavit in support of the plaintiff's motion for summary judgment.

Section 2 *Definition*: (e) *Operator*—"any person conducting the operation of a parking place or receiving the consideration for the parking or storage of motor vehicles at such parking place; the term does not include the City but does include the Public Parking Authority of the City of Pittsburgh and does include operators on premises of Public Parking Authority of the City of Pittsburgh and non-profit corporations which store or park vehicles for a consideration."

Section 3 *Imposition of Tax:* "A tax—is hereby imposed upon all transactions of each operator with respect to each non-residential parking place, at the rate of 20 per centum (20%) of the gross receipts from all such transactions during the year 1970, and thereafter—"

The lessee-plaintiffs have paid the taxes imposed by the Ordinance for the years 1970 and 1971 [3] and

---

[3] **Parking Tax Payments Since April 1, 1970 by Lessee-Plaintiffs**

Lessee-Plaintiff	Tax Year 1970	Tax Year 1971	Total
Associated Dry Goods Corporation—Joseph Horne Co.	$127,185.54	$112,631.20	$263,409.70*
Gimbel Brothers, Inc.	98,057.10	105,978.38	204,035.48
The May Department Store Company	198,941.00	195,192.00	394,133.00
Parking Service Corporation Bigelow Blvd.	82,146.17	42,892.48	

have demanded a refund thereof from the City which has been refused.

The question raised by this case is whether or not the Public Parking Authority of Pittsburgh and those who operate its facilities are exempt from payment of the tax imposed by the Parking Tax Ordinance.

Although the Parking Authority Law has given rise to much litigation, the precise question herein involved has never been squarely before the Court. However, from past litigation and from the Act itself certain characteristics of Authorities created under the Parking Authority Law, as are herein pertinent, have been firmly established; i.e., the purposes of Parking Authorities are public uses for which public money may be spent, Parking Authority Law, supra, Sections 1 and 2; the properties of Parking Authorities are public property and when used for the purposes contained in the Act, the public nature of such uses is conclusively determined, *McSorley v. Fitzgerald,* 359 Pa. 264, 59 A. 2d 142 (1948); *Pgh. Pub. Parking Auth. v. Bd. Property Assessors,* 377 Pa. 274, 105 A. 2d 165 (1954); an Authority existing by virtue of the Parking Authority Law and pursuing the purposes thereunder are public in nature and its facilities whether operated by the Authority or

Third Ave.	92,160.98	48,340.34	
9th and Penn	70,852.21	54,952.76	
	245,159.36	146,185.58	391,344.94

* This total does not correspond with the amounts for each year. However, the amounts for each year and the total are as they appear in the Complaint.

leased to private parties are public property. *Pgh. Public Parking Auth. Petition*, 366 Pa. 10, 76 A. 2d 620 (1950); *Midtown Motors v. Public Parking Authority of Pgh.*, 372 Pa. 475, 94 A. 2d 572 (1953); *Pgh. Pub. Parking Auth. v. Bd. of Prop. Assessors*, supra; *Price v. Phila. Park. Auth.*, 422 Pa. 317, 221 A. 2d 138 (1966).

It is thus clear that the property of an Authority incorporated under the Parking Authority Law and in pursuit of the purposes therein is public property; and the property or facilities of such an Authority does not lose their public nature where they are leased to private parties who operate them for private profit.

The Constitution of Pennsylvania, as amended, Article VIII, Section 2, provides as follows:

> "(a) The General Assembly may by law exempt from taxation:
>
> (iii) That portion of public property which is actually and regularly used for public purposes."

Our Constitution does not create exemptions, but it authorizes the General Assembly to grant exemptions. The first section of the taxation and finance article of our Constitution, providing that the General Assembly may, by general laws, exempt from taxation various enumerated properties, exempts nothing, but merely permits the General Assembly to grant exemptions within the lines laid down for its guidance. However, generally, and in the absence

of express statutory authority, public property devoted to public use is not subject to taxation, and no express exemption is necessary. *Fidelity-Phila. Trust Co. v. Hines,* 337 Pa. 48, 10 A. 2d 553 (1940); *Pittsburg v. Sterrett Subdistrict School,* 204 Pa. 635, 54 A. 463 (1903); *Directors of the Poor of Schuylkill County v. School Directors of North Manheim Township,* 42 Pa. 21 (1862); *Robb v. City of Phila.,* 25 Pa. Super. 343 (1904); *City of Reading v. Berks County,* 22 Pa. Super. 373 (1903).

The General Assembly did include in The Parking Authority Law, supra, Section 6, the following exemption from taxes:

> ". . ., such Authorities shall not be required to pay any taxes or assessments upon any property acquired or used by them for such purposes. . . ."

The foregoing exemption is merely a codification of the existing law as it applies to public property.

There is no question that the real estate or real property of such Authorities is exempt from taxation and this exemption applies even though the real estate or real property is leased to or operated by private parties for private profit. *Pgh. Pub. Parking Auth. v. Bd. Prop. Assess.,* supra.

The City contends that the Public Parking Authority of Pittsburgh and its lessees are subject to the tax imposed by the Parking Ordinance Tax and relies on *C. A. McGillick et al. v. The City of Pittsburgh,* 85

January Term, 1963, Miscellaneous Docket [4] affirmed Per Curiam, without opinion, 415 Pa. 581, 203 A. 2d 480 (1964), whereas plaintiffs rely for exemption from said tax on *Allegheny County v. Moon Twp.*, 436 Pa. 54, 258 A. 2d 630 (1969).

The *McGillick* case, was an appeal [5] by way of a case stated, challenging the validity of the Parking Tax Ordinance of the City of Pittsburgh, being Ordinance 434 of 1962, effective Feb. 1, 1963, on the grounds that it violated the uniformity clause of Article IX, Section 1 of the Constitution of Pennsylvania [6]. The Ordinance imposed a tax upon all transactions of each operator with respect to each commercial parking place. The Ordinance defined "commercal parking place" and excluded therefrom parking areas of hotels, tourists' courts, trailer parks and parking areas provided or leased to occupants of residence for use only in connection with the occupancy of such residence. The Ordinance also defined the word "operator" and excluded therefrom the Public Parking Authority of the City of Pittsburgh but did include operator or lessees under the Public Parking Authority. The Court held that the exclusions from the definition "commercial parking place" were reasonable classifications and not violative of Article IX, Section 1, but did hold that the exclusion of the

[4] In the then Court of Quarter Sessions of Allegheny County, Pa.

[5] The appeal was taken pursuant to the Act of 1947, 53 P.S. 6853, known as the Stonier-Brunner Act.

[6] The other questions raised and disposed of by the Court in the appeal are not herein relevant.

Public Parking Authority of the City of Pittsburgh did violate the uniformity clause of the Constitution and to that extent sustained the appeal of the plaintiffs. In so holding the Court also stated: ". . . It should be noted that the Parking Authority Law provides that 'any property' acquired or used by the Authority for its purposes is exempt from any taxes. We are of the opinion that this does not exempt taxes upon parking transactions which under this Ordinance are in the nature of excise taxes as contrasted to property taxes. . . ." This statement by the Court was not necessary to the determination of the issue before it and is clearly dictum. The question before the *McGillick* court was the reasonableness of the classification of the various subjects of taxation. The question of the nature of the tax and exemption therefrom was not before the Court nor necessary for its decision. It is also true that the inclusion of a particular subject for taxation does not mean that it cannot be exempt therefrom. Exclusion is not equated to exemption no more than inclusion is equated to non-exemption.

The order entered by the *McGillick* Court as herein applicable is as follows:

> ". . ., the Pittsburgh Parking Tax Ordinance No. 434 of 1962 is hereby declared to be valid except for that part of Section (2e) which excludes the Public Parking Authority of the City of Pittsburgh from the definition of the term 'operator'; . . ."

The Supreme Court on appeal entered the following order:

> "Opinion Per Curiam, September 29, 1964: Order affirmed."

A Per Curiam order without opinion merely affirms the result of the lower Court. A judgment of affirmance is not to be understood as necessarily expressing the concurrence of the appellate court in all the conclusions or reasoning expressed in the opinion filed by the court below. Standard Pa. Practice, Vol. 9, page 586. It is inconceivable that important questions of public policy could be thought to be settled authoritatively for the future by mere silence of an appellate court.

In the *Allegheny County v. Moon Township* case, supra, the township passed an ordinance providing for a ten percent tax on gross receipts of each commercial parking lot in the township.[7] One of the lots was located at the Allegheny County Airport which was owned by Allegheny County but operated by a concessionaire. Previously, in the case of *Moon Township Appeal,* 387 Pa. 144, 127 A. 2d 361 (156) the Supreme Court held that the same parking lot was "public property used for public purposes" and therefore tax-exempt. The Township took the position that the *Moon Township Appeal case* dealt with property taxes whereas the *Allegheny County v. Moon Township* case deals with an

[7] At oral argument the Court was informed that the Moon Township Ordinance is substantially identical to the Pittsburgh Parking Tax Ordinance.

"excise tax". The Court in rejecting this distinction and in holding the concessionaire operated parking lot owned by the County of Allegheny exempt from the township parking tax said:

> ". . . Unfortunately for the township, the tax-exempt status of this parking lot does not depend on the label attached to the tax."

The Court after quoting Article VIII, Section 2 of the Constitution cited the General Assembly Assessment Law, Act of May 22, 1933, P. L. 853, Art. II, §204, as amended, 72 P.S. Sec. 5020-204(g) which provides:

> "The following property shall be exempt from all . . . (City) . . . township . . . tax, to wit . . . (g) All other public property used for public purposes . . .,"

stated in relation thereto: — "Neither the constitution, nor the statute, say the exemption will be only for property taxes; the statute, in fact, expressly says 'all tax'. The word 'property' is used merely to describe the locus of what the Legislature was exempting, not the type of tax it was exempting it from. There is no reason to assume that the Legislature did not fully exercise its constitutional power to exempt this property, not only from property taxes, but also from taxes on activities conducted on the property . . ."

Having to choose between two cases out of our Supreme Court dealing with the question involved in the instant case, one of which, i.e., the *McGillick*

case, was a Per Curiam affirmance without opinion, and one of which, i.e., the *Allegheny County v. Moon Township* case, is a decisional opinion having the force of stare decisis, we have no choice but to follow the latter case.

The Act of 1933, supra, refers to (g) "all other public property"; Section 6 of the Parking Authority Law uses the phrase "any property acquired or used by them for such purposes" (public). The Statutory Construction Act, Act of 1937, May 28, P. L. 1019, Art. IV, §51, 46 P.S. 551, mandates that words used in similar statutes be given similar meaning. Since "property" in the Act of 1933 is used "merely to describe the locus of what the Legislature was exempting, not the type of tax it was exempting it from", *Allegheny County v. Moon Township,* supra, the same holds true as to the use of the word "property" granting exemption in the Parking Authority Law.

Again the Act of 1933 refers to ". . . all . . . tax . . ."; about which the Supreme Court said in *Allegheny County v. Moon Township,* supra, ". . . neither the Constitution, nor the statute, say the exemptions will be only for property taxes; the statute, in fact, expressly says (The following property shall be exempt from) 'all tax'." Section 6 of the Parking Authority Law uses the phrase ". . . shall not be required to pay *any** taxes . . . upon *any** property. . ."

In order to determine the meaning of the word "any" in this section of the Parking Authority Law,

* Emphasis added.

resort must be had to the Statutory Construction Act, supra, in order to ascertain and effectuate the intention of the Legislature. In the creation of Parking Authorities, the Legislature sought to grant an exemption to them, acting as an agency of the Commonwealth (Sections 1, 2) for public purposes from any taxes or assessments. Although, the Statutory Construction Act demands that "provisions exempting persons and property from taxation" be strictly construed, such a rule must give way in the face of manifest legislative intent.

The word "any" is a broad and comprehensive term and generally means "all" or "every" but not always, 3 A Words and Phrases 64 et seq. The Webster's Third New International Dictionary defines "any" in three grammatical uses; as a pronoun, an adverb and, appropriate to this case, an adjective, as follows: (1) One differently out of more than two; (2) one, some or all indiscriminately of whatever quantity—(b) all—used as a function word to indicate the maximum or whole or a number or quantity.

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used". *Towne v. Eisner*, 245 U.S. 418, 38 St. Ct. 158 (1918). The meaning of a word in a statute "depends on its legislative environment." *Georgia v. Evans*, 316 U.S. 159, 62 St. Ct. 972 (1942)

If we were to interpret "any" as used in the context of the Parking Authority Law in any way other

than in an all-inclusive manner we would undermine the basic principle of law that generally, and in absence of express statutory authority, public property devoted to public use is not subject to taxation, and no express exemption is necessary (citations, supra). Therefore "any" taxes means "all" taxes, otherwise the consequence would alter the fundamental policy of exempting public property devoted to public use from taxation.

Further, Section 6 of the Parking Authority Law uses the language ". . . shall not be required to pay any taxes . . . upon any *property acquired or used* * by them for such purposes . . ." The Act, Sections 1, 2, contemplates the Authority will acquire property for its purposes both as a holder of the fee and as a lessee. It is certain from the exempting language of Section 6 in light of the manner of acquiring property, Sections 1, 2, that the tax exemption is for other than property real estate taxes and thus includes taxes on the use of the property. Taxes on the use of property are generally denominated excise taxes. Hence, it is obvious from the legislative language employed that the exemption from paying "any" taxes means all taxes both real estate and excise taxes.

Summary judgment will be entered for the plaintiffs.

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* Emphasis added.

Opinion of Court of Common Pleas
Order

ORDER

And Now, this 29th day of December, 1972, after argument, consideration of the briefs of the parties and a review of the record, the plaintiffs' motion for summary judgment is granted, and further:

1. The City of Pittsburgh is enjoined and restricted from enforcing Ordinance No. 704 against any of the plaintiffs as to the following facilities:

Lessee	*Location*
Associated Dry Goods Corporation — Joseph Horne Co.	Sixth Street and Fort Duquesne Blvd.
Gimbel Brothers, Inc.	Smithfield Street and Liberty Ave.
The May Department Store Company	Fifth Ave. at Cherry Way; Blvd. of the Allies and Cherry Way
Parking Service Corporation	Ninth Ave. and Penn Ave.; Bigelow Blvd., Third Ave.

2. The City of Pittsburgh is ordered to repay to the plaintiffs as their interest may appear all taxes paid pursuant to Ordinance No. 704 for the years 1970 and 1971 arising from the operation of the aforesaid facilities.

By the Court
Silvestri, J.

Eo die exceptions noted and bill sealed.

By the Court
Silvestri, J. [Seal]

IN THE COURT OF QUARTER SESSIONS
OF ALLEGHENY COUNTY, PENNSYLVANIA

No. 85 January Term, 1963
Miscellaneous Docket

C. A. McGillick et al.,

Plaintiffs

v.

The City of Pittsburgh, a Municipal Corporation,

Defendant

OPINION

Before: Lansberry and Van der Voort, JJ.

Van der Voort, J.

These proceedings involve an appeal to the Quarter Sessions Court by thirty-three taxpayers (Appellants) from an Ordinance enacted by the City of Pittsburgh (City) imposing a tax of ten percent (10%) upon the gross receipts from commercial parking transactions. After the appeal was filed on January 25, 1963, the City filed a Motion for a More Specific Pleading which was followed by an Amendment to the Appeal. The parties then agreed upon and filed a case stated. The issues were then argued

before the Court en Banc composed of McCreary, Lansberry and Van der Voort, JJ. Before this Opinion was completed, Judge McCreary passed away.

The Appellants challenge the City's Parking Tax Ordinance as it is commonly called on the following grounds:

1. That it violates Section (1) of Article (9) of the Constitution of Pennsylvania in that the tax imposed is not uniform upon the same class of subjects;

2. That the tax imposed by the Ordinance is unlawful double taxation;

3. That by enacting the Ordinance the City is violating the policy of cooperation between government and private enterprise; and

4. That the tax imposed unreasonably interferes with the interstate commerce clause in violation of Section (8) of Article (1) of the Constitution of the United States.

Before the Court en Banc entertained the arguments of counsel, it considered the matter of jurisdiction of the Quarter Sessions Court to consider the matters raised in the appeal. The provisions of the Stonier-Brunner Act of 1947, 53 P.S. 6853 relating to appeals provides as follows:

> "Within said thirty days, taxpayers representing 25% or more of the total valuation of real estate in the political subdivision as assessed for taxation purposes, or taxpayers of the political subdivision not less than 25 in number aggrieved

by the ordinance or resolution shall have the right to appeal therefrom to the court of quarter sessions of the county upon giving bond with sufficient security in the amount of five hundred dollars ($500), approved by the court, to prosecute the appeal with effect and for the payment of costs. The petition shall set forth the objections to the tax and the facts in support of such objections, and shall be accompanied by the affidavit of at least five of the petitioners that the averments of the petition are true and the petition is not filed for the purpose of delay.

* * * * * *

"It shall be the duty of the court to declare the ordinance and the tax imposed thereby to be valid unless it concludes that the ordinance *is unlawful or finds that the tax imposed is excessive or unreasonable;* but the court shall not interfere with the reasonable discretion of the legislative body in selecting the subjects or fixing the rates of the tax. *The court may declare invalid all or any portion of the ordinance or of the tax imposed or may reduce the rates of tax.*" (Emphasis supplied.)

Ordinarily, in appeals of ordinances to the Courts of Quarter Sessions the scope of the Court's review is limited to procedural defects or irregularities in the adoption of the ordinance. *Wynnewood Civic Assiciation v. Lower Merion Township,* 180 Pa. Super. 453, 119 A. 2d 799 (1956). Typical language providing for ordinary appeals from ordinances may be

found in The First Class Township Code and is as follows:

> "Complaint as to the legality of any ordinance or resolution may be made to the court of quarter sessions upon entering into bond with sufficient security to be approved by the court to prosecute the same with effect and for the payment of costs by any person aggrieved, within thirty days after any ordinance or resolution takes effect. The determination and the order of the court thereon shall be conclusive. In cases of the laying out of streets over private property the court shall have jurisdiction to review the propriety as well as the legality of the ordinance."

It appears to us that there is a significant difference in the language authorizing an appeal in the Stonier-Brunner Act and that authorizing an appeal in the various municipal codes. In the *Allentown School District Mercantile Tax Case,* 370 Pa. 161 (1952), the Quarter Sessions Court of Lehigh County reviewed the question of the constitutionality of a mercantile tax resolution of the School District of the City of Allentown as well as the question of whether or not it conformed to the Stonier-Brunner Act. While it does not appear that the question of jurisdiction was actually raised in connection with the appeal, the Supreme Court of Pennsylvania gives no indication in its opinion in that case that the Quarter Sessions Court did not have jurisdiction to entertain the appeal. We therefore conclude that the Quarter

Sessions Court of Allegheny County in this appeal from the Pittsburgh Parking Tax Ordinance is not limited to a review of procedural defects or irregularities but has jurisdiction to review the objections to the ordinance made by these Appellants.

We will discuss these objections in the order in which they have just been set forth hereinabove. The City passed the Parking Tax Ordinance which is numbered 434 of 1962 on December 27, 1962. The Ordinance recited, as it is required to do, that it was enacted under the Act of June 25, 1947, P. L. 1145, the Stonier-Brunner Act and its amendments. The purpose of the Ordinance is stated as follows:

> "TO PROVIDE for the general revenue by imposing a tax upon the transactions involved in parking motor vehicles at commercial parking places, as measured by the gross receipts received therefrom by the operators thereof; requiring a license and the payment of the tax as a condition to the conducting of such transactions, providing for the levy and collection of such tax; prescribing requirements for returns and records; conferring powers and duties upon the Treasurer; and imposing penalties."

The levying clause of the Ordinance is contained in Section (3) which provides as follows:

> "SECTION 3. *Imposition of Tax:* A tax for general revenue purposes is hereby imposed upon all transactions of each operator with respect to each commercial parking place, at the rate of

ten percent (10%) of the gross receipts from all such transactions received upon and after the effective date of this ordinance during the year 1963. No person shall conduct such transactions without complying with all the provisions of this ordinance and paying the tax hereby imposed."

The Ordinance expressly defines the word, "transaction" as follows:

"(f) 'transaction'—the transaction involved in the parking or storing of a motor vehicle at a commercial parking place for a consideration."

The effective date of the Ordinance is February 1, 1963, which was more than thirty days after its passage as the law requires.

The Ordinance also defines "commercial parking place." This definition expressly excludes from it parking areas of hotels, tourist courts, trailer parks and parking areas provided or leased to occupants of a residence for use only in connection with the occupancy of such residence.

The Ordinance also defines the word, "operator". In its definition of the word, "operator", the Ordinance expressly excludes the City and the Public Parking Authority of the City of Pittsburgh but does include operators on the premises of the Public Parking Authority of the City of Pittsburgh. The Appellants contend that these exclusions constitute an illegal and unreasonable classification of subjects of taxation and that in this respect the Parking Tax Or-

dinance violates Section (1) of Article (9) of the Pennsylvania Constitution. Said Article reads as follows:

> "All taxes shall be uniform upon the same class of subjects within the territorial limits of the Authority levying the tax and shall be levied and collected under the general laws."

These exclusions represent a classification of subjects of the parking tax. We will consider first the exclusion of parking areas or garages of residents of hotels, tourist courts and trailer parks. The exclusion of these parking areas or garages is set forth in the following language: "not including (i) any parking area or garage to the extent that it is provided or leased to occupants of a residence on the same or other premises for use only in connection with and as accessory to the occupancy of such residence and (ii) any parking area or garage operated exclusively by an owner or lessee of a hotel, tourist court or trailer park, to the extent that such parking area or garage is provided to guests or tenants of such hotel, tourist court, or trailer park for no additional consideration."

The City argues that 273,800 automobiles enter and leave the Golden Triangle area of the City on the average weekday; that during each weekday 109 policemen are detailed to direct the traffic in the downtown area of Pittsburgh; that 12% of the downtown land area is devoted to parking and 30% of it to streets so that nearly 42% of the Golden Triangle is used for the purpose of moving and storing

automobiles; that many of the traffic policemen are stationed at or near the main street entrances and exits of commercial parking garages during the rush hours; that these conditions impose a heavy fiscal burden upon the City; that the road mileage in the City over which this traffic is concentrated is relatively small so that the aid which the City receives from the State and which is distributed upon a formula based 60% upon road mileage and only 40% on population does not take into full consideration the relative effect upon the City's economy of this high traffic intensity.

The City further points out that the problems with respect to residential parking of motor vehicles are different in that such parking places are not concentrated in specific business or cultural areas but on the other hand are widely spread about; that the changing intensity of residential parking is moderate compared to the rapid changing of commercial parking; and that the problems of collecting the tax are substantially different between commercial parking places and residential ones.

In the case of *Hickory Township v. Brockway*, 201 Pa. Super. 260, 192 A. 2d 231 (1963), the Court was considering a classification in connection with sewer rentals charged by the Township. The Hickory Township Ordinance made a uniform sewer rental charge of $50.40 a year for each residence in the Township. It classified motels in a different class and charged rentals for motels in accordance with a schedule. Restaurants, clubs, trailers, parking center

washrooms were also included in this class. The Superior Court sustained the Hickory Township Sewer Rental Ordinance and the classification which distinguished between residential sewer rentals and commercial sewer rentals. In its Opinion on page 269, it stated as follows:

> ". . . The classification of commercial users as against residential users is *prima facie* reasonable. . . ." (Emphasis supplied.)

We believe that the placing of commercial parking places in a taxable class and placing residential parking places in a non-taxable class is a realistic and practical classification. The Stonier-Brunner Act itself enjoins the Court not to "interfere with the reasonable discretion of the legislative body in selecting the subjects or fixing the rates of the tax."

The legislative discretion has been consistently upheld by our Appellate Courts where there is some reasonable basis for the classification. In *Coe et al. v. Duffield*, 185 Pa. Super. 532, 138 A. 2d 303 (1958), a taxing resolution of Franklin Township, Greene County, Pennsylvania was involved. This resolution taxed admissions to drive-in theaters and roller skating rinks, but did not tax other amusements for which admission was charged. The Superior Court upheld this classification. In its Opinion by Judge Woodside, the Court stated at page 535:

> "In the legitimate exercise of the power of taxation, persons and things always have been, and may constitutionally be, classified. The se-

lection of the subject for taxation, their classification, and the method of collections are legislative matters. *Durach's Appeal,* 62 Pa. 491, 494 (1870); *Commonwealth v. Del. Div. Canal Co.,* 123 Pa. 594, 620, 16 A. 584 (1889). Classification for the purpose of taxation may be based on the existence of differences recognized in the business world, on the want of adaptability of the subjects to the same method of taxation, upon the impracticability of applying to them the same methods so as to produce justice and reasonable uniform results, or upon well grounded considerations of public policy. *Heisler v. Thomas Colliery Co.,* supra, 274 Pa. 448, 118 A. 394 (1922)."

In *Coe v. Duffield,* 185 Pa. Super. 532, the Court cites the case of *Chain Store Tax Case, State Board of Tax Commissioners of Indiana v. Jackson,* 283 U.S. 527, 539, 518, 51 S. Ct. 540, 75 L. Ed. 1248. In that case, the Court said with regard to the classification of the subjects of taxation as follows:

"The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction. . . . A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor

> arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law. It is not the function of this court . . . to consider the propriety or justness of the tax. . . . Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great."

The Superior Court also pointed out in its Opinion that the language quoted above from the *Chain Store Tax Case,* 283 U.S. 527 was quoted favorably in the Opinion of the Supreme Court of Pennsylvania in the case of *Commonwealth v. Girard Life Insurance Co.,* 305 Pa. 558, 158 A. 262 (1932), wherein the Supreme Court of Pennsylvania held that life insurance companies could be legally classified into stock companies on the one hand and mutual companies on the other. *Coe v. Duffield,* 185 Superior Court 532 is cited favorably in the *Jones & Laughlin Tax Assessment Case,* 405 Pa. 421, 434, 175 A. 2d 856 (1961).

In the case of *Philadelphia v. Samuels,* 338 Pa. 321, 12 A. 2d 79 (1940), which will be again discussed later in this Opinion the Ordinance of the City of Philadelphia which imposed a tax upon open parking lots but did not tax enclosed parking lots was upheld by the Pennsylvania Supreme Court. The Court held that this difference in classification between open parking lots and closed parking lots was not unreasonable.

By its definition of the word, "operator", the Parking Tax Ordinance excludes from the parking tax the City itself and the Public Parking Authority of the City of Pittsburgh but not the operators on the premises of the Public Parking Authority of the City of Pittsburgh. This means that the City itself is exempt from the tax and that such parking operations as are conducted directly by the Public Parking Authority of the City of Pittsburgh are also exempt from the tax. Those parking operations which are conducted by concessionaires or lessees of the Public Parking Authority of the City of Pittsburgh are subject to the tax under the terms of the Parking Tax Ordinance.

The Pittsburgh Public Parking Authority owns seven garages in the downtown area of the City having 5,155 parking spaces. These seven garages are operated by "operators on the premises of the Pittsburgh Public Parking Authority" as follows:

Joseph-Horne Company—(1) garage
Parking Service Corporation—(3) garages
Penn Machine Company—(1) garage
The May Company—(2) garages

The parking operations conducted by these operators are subject to the tax.

The Pittsburgh Public Parking Authority itself operates six metered lots in other areas of the City having 348 parking spaces. Under the terms of the Parking Tax Ordinance the parking operations conducted in these metered lots are not subject to the tax. The Pittsburgh Public Authority by virtue of a lease be-

tween it and the Urban Redevelopment Authority is the tenant of the Allegheny Center Parking Lot which has 300 parking spaces. This lot is operated by M. & G. Parking under a management contract and the parking operations at this lot are subject to the tax. The Pittsburgh Public Parking Authority also owns (since October 1, 1963), the Bigelow-Pentland Parking Lot in downtown Pittsburgh. The parking operations on this lot are conducted by the William Penn Parking Lots and are subject to the parking tax. The City of Pittsburgh itself carries on the parking operations on the Monongahela Wharf Parking area through its own employees. The parking operations on the Monongahela Wharf are not subject to the tax under the terms of the Ordinance. The City also operates parking meters along many of the streets in the City and in the Schenley Plaza (Carnegie Library) parking area. The parking operations with respect to these parking meters are not subject to the tax under the terms of the Ordinance.

All parking meter revenues collected by the City are paid over to the Public Parking Authority under an agreement between the City and the Authority. Such revenues may be used for purchase of parking meters for either the City or the Authority, for maintenance costs of parking meters of either the City or the Authority, for principal and interest of bonds of the Authority or for construction and acquisition costs of the Authority. Any parking meter revenues not required for the above purposes may be returned to the City by the Authority. In 1963, for the first time the Authority transferred $525,000 to the City.

We are of the opinion that the flat exemption of the Pittsburgh Public Parking Authority as an operator of parking lots does not comply with Section (1) of Article (9) of the Pennsylvania Constitution requiring uniformity of taxes upon the same class of subjects. While the exemption with respect to parking operations of the Pittsburgh Public Parking Authority actually only now applies to unattended metered parking lots, the exemption is not limited to such operations by the terms of the Ordinance. We are not holding that the City may not classify unattended metered parking lots in a separate class and exclude such class from the tax. Our holding is that a blanket exclusion of the Pittsburgh Public Parking Authority as an "operator" does not conform to the uniformity requirements of the Pennsylvania Constitution. Under the present factual situation this ruling affects only 348 metered parking spaces which are operated directly by the Pittsburgh Public Parking Authority. It should be noted that the Parking Authority Law provides that "any property" acquired or used by the Authority for its purposes is exempt from any taxes. We are of the opinion that this does not exempt taxes upon parking transactions which under this Ordinance are in the nature of excise taxes as contrasted to property taxes. See the Act of Assembly of June 5, 1947, P. L. 458, 53 P.S. 355. In view of the severance clause in the Ordinance our holding with respect to the Pittsburgh Public Parking Authority's non-taxed operations in no way invalidates the whole Ordinance. *Millcreek Township School District v. The Star Theatre, Inc.*, 172 Pa. Superior Ct. 291, 94 A. 2d 53 (1953).

We find the exclusion of parking transactions conducted by the City of Pittsburgh itself to be a reasonable and proper provision. This exclusion amounts to placing parking transactions conducted by the City in a separate class. If this classification were not established the City would be levying a tax upon itself. While such a levy would be a lawful one, it would be an impractical one and would require the City to do useless things.

The Appellants contend that the Parking Tax Ordinance imposes unlawful double taxation upon them. They claim that they are paying real estate taxes on the land and in some cases on the buildings upon or in which the parking operations take place and that they are also paying a tax upon the operations of their parking lots. The parking lot tax does not result in double taxation because double taxation results only where two identical taxes are imposed by the same taxing body upon the same subject matter: *Spencer v. Snedeker,* 361 Pa. 234, 64 A. 2d 771 (1949) and *Plumly v. Philadelphia School District,* 182 Pa. Superior 122, 126 A. 2d 768 (1956). In the instant situation there are different taxes imposed upon different subject matters. The tax which is levied and assessed by the City upon the real estate is a property tax imposed directly upon the land. The parking tax which is levied by the City upon the commercial transaction occurring when a motor vehicle is parked for a consideration or fee is an excise tax which is levied upon the parking operation.

The Appellants advanced the theory that the parking of a motor vehicle is essentially a rental of space

that the parking tax therefore is a tax upon rental income from real estate and that such a tax is a tax on the property itself so that there results unlawfully double taxation upon parking lot properties. A similar contention was rejected by the Supreme Court of Pennsylvania in the case of *Philadelphia v. Samuels*, 338 Pa. 321, supra. In the *Samuels* case, the parking lot owners contended that the proposed parking tax was foreclosed to the City of Philadelphia because some of the parking lots were operated by corporations and the Commonwealth of Pennsylvania already taxed corporate net income. Concerning this position, Justice Linn, speaking for the Supreme Court of Pennsylvania said at page 326:

> ". . . This court is committed to the view that the corporate net income tax is a property tax. The tax imposed by the ordinance is an excise tax and therefore cannot be in conflict with the state act taxing property. What the ordinance taxes is the 'transaction', the activity specified in the enabling act; it is the transaction that results when one parks his car in an open parking place . . ."

At the argument the Appellants contended that the parking tax is excessive and confiscatory. The City of Philadelphia's Parking Tax Ordinance was adopted about 1937 pursuant to the enabling statute called the Sterling Act of August 5, 1932, P. L. 45, 53 P.S. 15971. This Philadelphia Ordinance taxed parking transactions carried on at open parking lots at the rate of 10% of the gross receipts from such transactions. The Supreme Court held that this rate

of tax was not confiscatory based upon the evidence before it. In that connection, the Court said, at page 327:

> "Little need be said on the point that the ordinance is confiscatory. The state expressly authorized the city to levy taxes for general revenue purposes and the ordinance so provides. There is nothing in the record to show that the rate imposed by the ordinance is so high as to result in taking property without due process. The probability is that, in effect, the tax will be passed on to patrons, but if it is not, and if an occasional operator cannot afford to continue in business and pay the tax, it may be unfortunate, but will not render the ordinance invalid."

We find nothing in the record before us to indicate that the tax rate of 10% of the gross receipts is excessive or confiscatory.

The Appellants further contend that the Parking Tax Ordinance is contrary to the public policy of the Commonwealth of Pennsylvania declared by the Legislature in the Public Parking Authority Law, June 5, 1947, P. L. 458, 53 P.S. 341-356.

In Section (2) of the Parking Authority Law, the Legislature set forth its findings and made its declaration of a policy with respect to public parking of motor vehicles in the Commonwealth of Pennsylvania. In subparagraph (i) this Act provided:

> "That it is intended that the Authority cooperate with all existing parking facilities so

that private enterprise and government may mutually provide adequate parking services for the convenience of the public."

The Appellants contend that the Parking Tax Ordinance is an uncooperative act by the Government of the City of Pittsburgh. They claim that the language of Section (2) of the Parking Authority Law is a legislative directive toward cooperation which the City contravenes by imposing a tax upon commercial parking. There is nothing in the record before us to indicate that the City has done anything other than cooperate with private enterprise so that it and the City may mutually provide adequate parking services for the convenience of the public. There is language in the Act expressly exempting property of the Public Parking Authority from taxation. There is a significant absence of any such language exempting private property from taxation nor is there any language exempting parking transactions from taxation. Between the Public Parking Authority Law and the Stonier-Brunner Tax Law, the former was the earlier enactment. Where there is any conflict between two statutes the Courts must interpret the legislature to have intended that the provisions of the later Act be controlling. However, even assuming that these Acts were enacted at the same time we do not feel that the language contained in the Parking Authority Law was ever intended to exempt Parking Authorities from being taxed. We have already held hereinabove that the Public Parking Authority of the City of Pittsburgh cannot merely because it is a Public Parking Authority be exempted from the parking

tax. Certainly, if the Pittsburgh Public Parking Authority is subject to the tax other parking operations are likewise subject to it.

The final contention of the Appellants is that the parking tax violates Section (8) of Article (1), the commerce clause, of the United States Constitution in that it places an undue burden on interstate commerce. The law does not support this contention of the Appellants. The United States Supreme Court has decided as far back as 1914 that a State may prescribe necessary regulations for the operation of motor vehicles on its highways including the ones moving in interstate commerce. In *Hendrick v. Maryland,* 235 U.S. 610, 35 S. Ct. 140, 59 L. Ed. 385, state license fees on motor vehicles engaged in interstate commerce were upheld as constitutional. In the case of *Western Livestock v. Bureau of Revenue,* 303 U.S. 250, 58 S. Ct. 546, 82 L. Ed. 823, 115 A.L.R. 944 (1937), the Supreme Court through Justice Stone said at page 253:

> "Nor is taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by business."

And further, at page 254:

> "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing busi-

> ness. 'Even interstate commerce must pay its way.' *Postal Telegraph-Cable Co. v. Richmond*, 249 U.S. 252, 259; *Ficklen v. Shelby County Taxing Dist.*, 145 U.S. 124. . . ."

The parking transactions in the case at hand are obviously purely local transactions and the tax imposed thereon which is calculated at the situs of the transaction is a purely local tax. A municipality cannot impose any local tax upon the privilege of engaging in interstate commerce. The Parking Tax Ordinance does not exact any fee nor impose any tax upon the privilege of engaging in interstate commerce. The tax is upon the act of parking a motor vehicle as it uses, if its driver so elects, local parking facilities. The Supreme Court of the United States has consistently upheld local taxes which went far beyond the tax at issue.

In the case of *Aero Mayflower Transit Co. v. Board of Railroad Commissioners of Montana*, 332 U.S. 495, 68 S. Ct. 167, 92 L. Ed. 99 (1947), the State of Montana imposed two taxes (a flat rate tax and a gross revenue tax) on interstate motor carriers who operated *only in* interstate commerce. In upholding the Montana taxes, Justice Rutledge said the following, at page 503:

> "It is far too late to question that a state, consistently with the commerce clause, may lay upon motor vehicles engaged exclusively in interstate commerce, or upon those who own and so operate them, a fair and reasonable nondiscriminatory tax as compensation for the use of

its highways. *Hendrick v. Maryland,* supra; *Clark v. Poor,* 274 U.S. 554; *Aero Transit Co. v. Georgia Comm'n,* supra; . . ."

See also *Dixie Ohio Express Co. v. State Revenue Commission,* 306 U.S. 72, 59 S. Ct. 435, 83 L. Ed. 495 (1939); *Eichholz v. Public Service Commission of Missouri,* 306 U.S. 268, 59 S. Ct. 432, 83 L. Ed. 641 (1939). In the *Eichholz* case, local regulation which directly affected interstate commerce was nevertheless upheld by the Supreme Court. See also *Transamerican Freight Lines v. Commonwealth,* 396 Pa. 64, 151 A. 2d 630 (1959), and the numerous decisions of the United States Supreme Court cited therein at page 68. We are of the opinion that the Parking Tax Ordinance does not violate the commerce clause in Section (8) of Article (1) of the United States Constitution.

For the reasons set forth hereinabove, we find that the Pittsburgh Parking Tax Ordinance No. 434 of 1962 is valid with the exception of that part of Section (2) dealing with definitions which exclude the Pittsburgh Public Parking Authority of the City of Pittsburgh from the definition of the term "operator".

ORDER

And Now, this 26 day of February 1964, after argument upon a case stated and consideration of briefs, the Pittsburgh Parking Tax Ordinance No. 434 of 1962 is hereby declared to be valid except for that part of Section (2e) which excludes the Public Parking Authority of the City of Pittsburgh from the definition of the term "operator"; to the extent that the Public Parking Authority of the City of Pittsburgh is excluded from the term "operator" in the Ordinance the appeal of the Plaintiffs is sustained. In all other respects the Plaintiffs' appeal is dismissed.

Each party to pay his or its own costs.

By the Court,
Ellenbogen, *J.*

Eo die, Exceptions noted to the Plaintiffs and bills sealed.

By the Court,
Ellenbogen, *J.* (Seal)

ORDER OF THE SUPREME COURT

McGillick et al., Appellant v. Pittsburgh, Appellant
[415 Pa. 581]

Opinion Per Curiam, September 29, 1964:

Order affirmed.

Ordinance No. 704

ORDINANCE

No. 704 approved Dec. 31, 1969

AN ORDINANCE—To provide for the general revenue by imposing a tax of 20 per centum upon the transactions involved in parking motor vehicles at parking places, other than residential parking places, as measured by the gross receipts received therefrom by the operators thereof; requiring a license and the payment of the tax as a condition to the conducting of such transactions; providing for the levy and collection of such tax; prescribing requirements for returns and records; conferring powers and duties upon the Treasurer; and imposing penalties.

Whereas, Non-residential parking places for motor vehicles, by reason of the frequency rate of their use, the changing intensity of their use at various hours of the day, their location, their relationship to traffic congestion and other characteristics, present problems requiring municipal services and affect the public interest differently from parking places accessory to the use and occupancy of residences; and

Whereas, a tax for general revenue purposes upon the transactions involved in parking or storing motor vehicles at non-residential parking places would therefore be appropriate; and

Ordinance No. 704

Whereas, it is necessary in the public interest to increase the parking tax rate for the year 1970; Now, Therefore,

THE COUNCIL OF THE CITY OF PITTSBURGH, UNDER THE AUTHORITY OF ACT NO. 511 OF 1965, AND ITS AMENDMENTS, HEREBY ENACTS AS FOLLOWS:

Section 1. *Title:* This ordinance shall be known and may be cited as the "Parking Tax Ordinance."

Section 2. *Definitions:* As used in this ordinance, unless the context indicates clearly a different meaning, the following words and phrases shall have the meanings set forth below:

(a) "City"—the City of Pittsburgh.

(b) "Person"—any natural person, partnership, unincorporated association or corporation, non-profit or otherwise. Whenever used in any provision prescribing a fine or a penalty, the word "Person", as applied to partnerships, shall mean the partners thereof, as applied to unincorporated associations, shall mean the members thereof, and as applied to corporations, shall mean the officers thereof.

(c) "Non-Residential Parking Place" or "Parking Place"—any place within the City, whether wholly or partially enclosed or open, at which motor vehicles are parked or stored for any period of time in return for a consideration not including (i) any parking area or garage to the extent that it is provided or leased to

occupants of a residence on the same or other premises for use only in connection with, and as accessory to, the occupancy of such residence, and (ii) any parking area or garage operated exclusively by an owner or lessee of a hotel, an apartment hotel, tourist court or trailer park, to the extent that the parking area or garage is provided to guests or tenants of such hotel, tourist court or trailer park for no additional consideration.

As used herein, the term "residence" includes (i) any building designed and used for family living or sleeping purposes other than a hotel, apartment hotel, tourist court or trailer park, and (ii) any dwelling unit located in a hotel or apartment hotel.

The terms "hotel", "apartment hotel", "tourist court", "trailer park" and "dwelling unit" are used herein as defined in the Zoning Ordinance, Ordinance No. 192, approved May 10, 1958, as amended.

(d) "Month"—a calendar month.

(e) "Operator"—any person conducting the operation of a parking place or receiving the consideration for the parking or storage of motor vehicles at such parking place; the term does not include the City but does include the Public Parking Authority of the City of Pittsburgh and does include operators on premises of Public Parking Authority of the City of Pittsburgh and non-profit corporations which store or park vehicles for a consideration.

(f) "Transaction"—the transaction involved in the parking or storing of a motor vehicle at a non-residential parking place for a consideration.

(g) "Consideration"—refers to consideration received upon an express or implied contract or under a lease or otherwise, whether or not separately stated, and whether or not paid, provided or allowed by the person on whose behalf the motor vehicle is parked or stored or by some person.

(h) "Gross Receipts" — the monetary amount of the aggregate consideration from transactions.

(i) "Treasurer"—the Treasurer of the City of Pittsburgh.

Section 3. *Imposition of Tax:* A tax for general revenue purposes is hereby imposed upon all transactions of each operator with respect to each non-residential parking place, at the rate of 20 per centum (20%) of the gross receipts from all such transactions received during the year 1970, and thereafter, from year to year on a calendar year basis. No persons shall conduct such transactions without complying with all the provisions of this ordinance and paying the tax hereby imposed.

Section 4. *Annual License:* No operator shall conduct the operation of a non-residential parking place without obtaining for each parking place an annual license from the Director of the Department

of Public Safety of the City of Pittsburgh as required by Ordinance No. 435, approved December 27, 1962, within the time specified. Any operator not possessing such license for each parking place for the year 1970 or any following year shall obtain such license within thirty (30) days after the effective date of this Ordinance, and any person who intends to begin conducting the operation of a non-residential parking place shall obtain such a license before beginning such operation. At each parking place, the operator shall display the license in a conspicuous location at all times. Such licenses shall not be transferable between one operator and another or between one parking place and another. Any operator who ceases to conduct the operation of a parking place shall notify the Treasurer and return the license applicable thereto.

Section 5. *Records:* Each operator shall maintain, separately with respect to each parking place, complete and accurate records of transactions and of gross receipts of all transactions. Each operator shall issue to the person paying consideration, written evidence of such transactions or classes of transactions as the Treasurer may prescribe by regulations. Where consideration in a transaction is not separately stated, the operator shall maintain such evidence and records as are necessary to segregate the consideration applicable to the transaction. Each operator shall afford the Treasurer and his designated employees and agents access to all such records and evidence at all reasonable times and shall provide verification of the same as the Treasurer may require.

The Treasurer and agents designated by him are hereby authorized to examine the books, papers and records of any operator or supposed operator in order to verify the accuracy of any return made, or if no return has been made, to ascertain the tax due. Every such operator, or supposed operator, is hereby directed and required to give to the Treasurer, or any agent designated by him, the means, facilities and opportunity for such examinations and investigations, as are hereby authorized.

Section 6. *Returns and Payments:* Each operator, upon forms prescribed by the Treasurer shall file, on or before April 30, July 31, October 31, of the current tax year, and January 31, of the following year, returns showing gross receipts received with respect to each parking place during the respective three-month period ending on the last day of the month preceding the month in which the return due date occurs. At the time of filing the return, the operator shall pay to the Treasurer all tax due for the period to which the return applies.

Any operator who for the preceding quarterly period has failed to pay over the proper amount of tax to the Treasurer may be required by the Treasurer to file subsequent returns and pay the tax monthly. In such cases, payments of the tax shall be made to the Treasurer on or before the last day of the month succeeding the month for which the tax was due.

The City Treasurer is hereby authorized to accept payment under protest of the amount of parking tax claimed by the City in any case where the taxpayer

disputes the validity or amount of the City's claim for tax. If it is thereafter judicially determined by a court of competent jurisdiction that the City has been overpaid, the amount of the overpayment shall be refunded to the taxpayer.

Any operator who ceases to conduct the operation of a parking place shall notify the Treasurer and pay all taxes due in thirty (30) days.

Section 7. *Treasurer's Powers and Duties:* The Treasurer, on behalf of the City, shall receive and collect the taxes, interest, fines and penalties imposed by this ordinance, and shall maintain records showing the amounts received and the dates such amounts were received. The Treasurer shall adopt and enforce regulations relating to any matter pertaining to the administration of this Ordinance, but not limited to, requirements for evidence and records and forms for applications, licenses and returns.

Section 8. *Collection:* The Treasurer shall collect, by suit or otherwise, all taxes, interests, costs, fines and penalties due under this Ordinance and unpaid. If for any reason, any tax is not paid when due, interest at the rate of six per cent (6%) per year on the amount of unpaid tax and an additional penalty of one-half of one percent (½ of 1%) of the amount of unpaid tax for each month or fraction of month during which tax remains unpaid shall be added and collected. Whenever suit is brought for the recovery of unpaid tax, the operator shall, in addition, be liable for the costs of collection as well as for interest and penalties.

Section 9. *Violation:* Any person who violates any provision of this Ordinance or any regulation adopted pursuant to it shall, upon conviction thereof before any alderman or magistrate, be liable for a fine of not more than three hundred dollars ($300.-00), or, in default of payment of such fine, shall be imprisoned in the Allegheny County Jail or Allegheny County Workhouse for a period not exceeding thirty (30) days.

Section 10. *Severability:* If a final decision of a court of competent jurisdiction holds any provision of this Ordinance, or the application of any provision to any circumstances, to be illegal or unconstitutional, the other provisions of this Ordinance, or the application of such provisions to other circumstances, shall remain in force and effect. The intention of Council is that the provisions of this Ordinance shall be severable and that this Ordinance would have been adopted if any such illegal or unconstitutional provisions had not been included.

Section 11. Ordinance No. 674, approved December 28, 1968, entitled "An Ordinance to provide for the general revenue by imposing a tax of 15 per centum upon the transactions involved in parking motor vehicles at commercial parking places, as measured by the gross receipts received therefrom by the operators thereof; requiring a license and the payment of the tax as a condition to the conducting of such transactions; providing for the levy and collection of such tax; prescribing requirements for returns and records; conferring powers and duties upon

the Treasurer; and imposing penalties" shall remain in effect until the effective date of this Ordinance.

Section 12. *Effective:* This Ordinance shall become effective February 1, 1970, and shall remain in effect thereafter from year to year on a calendar Year basis.

Section 13. That any Ordinance or part of Ordinance, conflicting with the provisions of this Ordinance, be and the same is hereby repealed so far as the same affects this Ordinance.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-926

CITY OF PITTSBURGH,

Petitioner,

vs.

PUBLIC PARKING AUTHORITY OF PITTSBURGH, ASSOCIATED DRY GOODS CORPORATION, a Virginia corporation, successors to Joseph Horne Co., a Pennsylvania corporation, GIMBEL BROTHERS, INC., a New York corporation, THE MAY DEPARTMENT STORES COMPANY, a New York corporation, and PARKING SERVICE CORPORATION, a Pennsylvania corporation,

Respondents.

RESPONDENTS' REPLY TO PETITION OF THE CITY OF PITTSBURGH FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

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In The

Supreme Court of the United States

October Term, 1974

No. 74-926

CITY OF PITTSBURGH,

Petitioner,

vs.

PUBLIC PARKING AUTHORITY OF PITTSBURGH, ASSOCIATED DRY GOODS CORPORATION, a Virginia corporation, successors to Joseph Horne Co., a Pennsylvania corporation, GIMBEL BROTHERS, INC., a New York corporation, THE MAY DEPARTMENT STORES COMPANY, a New York corporation, and PARKING SERVICE CORPORATION, a Pennsylvania corporation,

Respondents.

RESPONDENTS' REPLY TO PETITION OF THE CITY OF PITTSBURGH FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA.

Counter-Questions Involved

1. Should the Supreme Court of the United States grant review of the decision of the Commonwealth Court of Pennsylvania holding respondents exempt from certain taxation under the Constitution and statutes of Pennsylvania where petitioner failed to raise a federal question in a timely manner before the Pennsylvania courts and no federal question was considered or decided at the state level?

2. Is there an impairment of contracts within the meaning of Article I, Section 10 of the United States Constitution where there is no record proof of impairment and no legislative action affecting the contract claimed to have been impaired?

Counter-Statement of the Case

Petitioner, in its effort to obtain review by certiorari, seeks to raise an issue under Article I, Section 10 of the United States Constitution relative to impairment of contracts. This issue is raised here for the first time, never having been considered or determined by any of the Pennsylvania courts in the course of this litigation.[1] Moreover, in an attempt to lend substance to this issue, the petition is replete with assertions of fact and assumptions, none of which are of record or supported by any evidence, and most of which are without foundation in fact.

Contrary to the first sentence on page 6 of the petition, this case does not involve the validity of the Pittsburgh Parking Tax Ordinance as petitioner erroneously states. The sole issue in this case from its inception is the *exemption from taxation* of respondents under City of Pittsburgh Ordinance No. 704 of 1969, which the Pennsylvania courts upheld in this case in accordance with the Constitution and statutes of Pennsylvania.[2] The validity of Ordinance No. 704 of 1969 was conceded by the parties and unquestioned by the Pennsylvania courts in this litigation.[3] Moreover, the cases cited in footnote 1, page 6 of the petition, not only have no relevance to the issue here

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[1] Petitioner first attempted to raise an issue under Article I, Section 10 of the United States Constitution in its Petition for Reconsideration to the Supreme Court of Pennsylvania which had previously denied its Petition for Allowance of Appeal (A. 3a). On October 31, 1974, the Pennsylvania Supreme Court denied the Petition for Reconsideration for Petition for Allowance of Appeal by *Per Curiam* order (A. 1a).

[2] The General County Assessment Law, Act of May 22, 1933, P.L. 853, 72 P.S. § 5020-204(g); Parking Authority Law, Act of June 5, 1947, P.L. 458, 53 P.S. § 355.

[3] *Cf. Alco Parking Corp. et al v. City of Pittsburgh,* ..... U.S. ..... (1974) wherein this Court upheld the validity of the Pittsburgh Parking Tax Ordinance (Ordinance No. 704 of 1969). No question of exemption under Pennsylvania law was raised in that case.

presented but do not involve the "same or similar parties" as petitioner states.[4]

Ordinance No. 704 of 1969 (hereinafter called "Parking Tax Ordinance") imposed a tax of 20% on the gross receipts of all "operators" of commercial parking lots and garages in the City of Pittsburgh (A. 48a), and was enacted pursuant to the Pennsylvania Local Tax Enabling Act; December 31, 1965, P. L. 1257, *et seq.*, 53 P.S. §6901 *et seq.*, as amended. The Parking Tax Ordinance specifically included, in its definition of "operator", the Public Parking Authority of the City of Pittsburgh and included operators on the premises of the Public Parking Authority of the City of Pittsburgh (A. 50a). The Public Parking Authority of the City of Pittsburgh (hereinafter called the "Authority") was created pursuant to the Parking Authority Law, Act of June 5, 1947, P.L. 458,53 P.S. §341 *et seq.* Section 2, 53 P.S. §342 of the Parking Authority Act, *supra,* which clearly states that parking authorities created thereunder are declared to be "public bodies" and, pursuant to Section 6, 53 P.S. §355 of said Act, are to be exempted from any taxes.

Respondents are the Public Parking Authority of the City of Pittsburgh and four business corporations operating parking garages on behalf of the Authority pursuant to certain leases (A. 5a). Respondents brought this action in equity seeking to enjoin the enforcement of the Parking Tax Ordinance as to

[4] Contrary to the assertion of petitioner, Associated Dry Goods Corporation, Gimbel Brothers, Inc., The May Department Stores Company and Public Parking Authority of Pittsburgh, all of whom are respondents herein, were *not* parties to any prior action involving either Ordinance No. 704 of 1969 or any of its predecessors. Furthermore, *William Penn Parking Garage, Inc., et al. v. City of Pittsburgh,* 11 Pa. Cmwlth. 507, 314 A. 2d 322 (1974), allocatur granted Pennsylvania Supreme Court, 3 March Term, 1975, cited in footnote 1, page 6 of the petition, concerns a subsequent parking tax ordinance. (Ordinance No. 30 of 1973, effective April 1, 1973) which, in fact, repeals Ordinance No. 704 of 1969 and imposes the tax directly on the parking customer as opposed to the parking operator.

them and to obtain a refund of all taxes collected pursuant thereto, contending that the parking operations of the Authority are exempt from the tax under the Pennsylvania Constitution, Article VIII, Section 2(a), subsection (iii), Section 6 of the Parking Authority Law, *supra,* footnote 2, and the General County Assessment Law, *supra,* footnote 2. which establish an exemption from taxation of any public property used for public purposes.

At the completion of the pleadings in this case, both petitioner and respondent presented motions for summary judgment. No testimony was taken. The Court of Common Pleas of Allegheny County, sitting *en banc,* granted respondents' motion for summary judgment, with a written opinion and order by Judge Silvestri Silvestri (A. 11a-25a).

The Commonwealth Court of Pennsylvania unanimously affirmed the Order of the Court of Common Pleas of Allegheny County (A. 5a). Pursuant to the Appellate Court Jurisdiction Act of 1970,[5] allowing appeal at the discretion of the Pennsylvania Supreme Court, the Pennsylvania Supreme Court denied petitioner's application, *per curiam,* without discussion. *City of Pittsburgh v. Public Parking Authority of Pittsburgh,* 11 Pa. Cmwlth. 442 (1974), allocatur denied ..... Pa. ....., ... A. 2d ..... (1974) (A. 3a).

Upon petition for reconsideration, which for the first time attempted to interject into the case the impairment of contracts issue under the United States Constitution, the Pennsylvania Supreme Court denied reconsideration again without discussion (A. 1a).

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[5] Act of July 31, 1970, P.L. 673, 17 P.S. §211.204.

ARGUMENT

This Court should not review the decision of the Commonwealth Court of Pennsylvania holding that the Parking Authority of the City of Pittsburgh and its lessees are exempt under Pennsylvania law from the imposition of municipal taxes upon their property being used for public purposes.

A. Petitioner's failure to raise in a timely manner any issue under Article I, Section 10 of the United States Constitution in the Pennsylvania courts precludes review of that issue in the United States Supreme Court.

It is beyond dispute on the record of this case that petitioner sought to introduce a federal question into this litigation only after receiving an adverse decision of the Commonwealth Court of Pennsylvania. It is obvious from the unanimous opinion of the Commonwealth Court in favor of respondents that the sole issue before it, as it was in the trial court, was respondents' exemption, under Pennsylvania law, from taxation under the Parking Tax Ordinance (A. 4a-10a; 11a-24a). Even in its Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, petitioner made no direct reference to an issue arising under the Federal Constitution. For the first time, in its Petition for Reconsideration of Petition for Allowance of Appeal, petitioner requested the Pennsylvania Supreme Court, *inter alia,* to review the decision of the Commonwealth Court as a violation of Article I, Section 10 of the United States Constitution.[6] The Supreme Court

[6] While not part of the record herein, the pertinent part of said Petition for Reconsideration reads as follows:

"D. If, as this Honorable Court held in *Alco v. City of Pittsburgh, supra,* at page 265, the City and the Authority are indistinguishable for Parking Tax purposes, then allowing the court below to overrule *McGillick* retroac-

(Footnote continued on following page)

of Pennsylvania denied reconsideration without discussion (A. 1a). It is the settled law of the Commonwealth of Pennsylvania that issues not raised in the trial court may not be raised subsequently in the Pennsylvania Appellate Courts. *Altman v. Ray*, 435 Pa. 401, 257 A. 2d 583 (1969); *In re Abrams Estate*, 419 Pa. 92, 213 A. 2d 638 (1965); *Kilian v. Allegheny County Distributors*, 409 Pa. 344, 185 A. 2d 517 (1962); *Wynnewood Civic Association v. Board of Adjustment of Lower Merion Twp.*, 406 Pa. 413, 179 A. 2d 649 (1962); *Schade v. Allegheny County Institution Dist.*, 386 Pa. 507, 126 A. 2d 911 (1956).

This Honorable Court has consistently refused to consider federal questions which were not raised, as required by state practice, before the trial court. See *e.g. Edelman v. California*, 344 U.S. 357 (1953); *Bailey v. Anderson*, 326 U.S. 203 (1945); *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447 (1936); *Hulbert v. Chicago*, 202 U.S. 275 (1906); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291 (1902); *Erie R. Co. v. Purdy*, 185 U.S. 148 (1901). Raising the federal question for the first time in a petition for review by the highest state court or, as was the case herein, in a petition for reconsideration,[7] has been held to be generally insufficient unless the state court actually entertains the petition and expressly decides the question. *Bailey v. Anderson, supra; Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935);

(Footnote continued from preceding page)
tively is also an impairment of the contract made by the City with its bondholders. * * * Accordingly, it violates Article I, Section 10 of the Constitution of the United States to apply *Moon Township* so as to deprive the City's bondholders of proper backing." (Petition for Reconsideration of City of Pittsburgh, Page 9.)

[7] The federal question may not be raised in briefs, petitions or oral arguments before state courts since those papers are not of record before this Court and, therefore, do not establish that the federal question was raised. *Live Oak Ass'n. v. Railroad Commission*, 269 U.S. 354 (1926); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934).

American Surety Co. v. Baldwin, 287 U.S. 156 (1932); *Forbes v. State Council*, 216 U.S. 396 (1910).

B. The decision of the Commonwealth Court of Pennsylvania declaring an exemption from the taxation imposed by the Parking Tax Ordinance does not constitute an impairment of contracts within the meaning of Article I, Section 10 of the United States Constitution since that clause of the Constitution relates solely to legislative action.

The Pennsylvania courts, in deciding this case, held that the long-standing tax exemption under Pennsylvania law for public property used for public purposes is valid and applicable to the respondents' parking operations (A. 4a-10a; 11a-25a). In reaching its decision, the Commonwealth Court of Pennsylvania correctly interpreted and applied the statutes[8] and the case law[9] of Pennsylvania to arrive at the conclusion that:

> ". . . public parking authorities, whether self-operated or leased for operation by others, are exempt from all taxes, whether levied upon them as real estate and called property taxes, or imposed upon the transactions by which they are used and called excise taxes" (A. 9a).

Petitioner asserts that the decision below by the Commonwealth Court is contrary to the *McGillick*[10] decision on which it claims reliance in guaranteeing the bonds of the Authority which, according to petitioner, are backed by the full faith and credit of petitioner. Thus, says petitioner, the contractual

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[8] See statutes cited at note 2, *supra*.

[9] *County of Allegheny v. Moon Township*, 436 Pa. 54, 258 A.2d 630 (1969).

[10] *C. A. McGillick et al. v. City of Pittsburgh*, 415 Pa. 581, 203 A.2d 480 (1964) (A.26a-47a) Petitioner erroneously asserts, on page 12 of its petition, that *McGillick* involved the same parties as those before the Pennsylvania courts in the instant case. In fact, none of the respondents participated in the *McGillick* case in 1964. See footnote 11, *infra*, for the Commonwealth Court's discussion of *McGillick* as it relates to this case.

rights of the Authority's and City's bondholders are impaired by the reduction of revenues accruing to petitioner by the exemption of respondents from the parking tax (See Petition, pp. 7, 8, 9, 16, 17 and 22).

First, the impairment of contracts clause of the United States Constitution, Article I, Section 10, has been interpreted to apply only to those impairments of contractual obligations resulting from legislative action. See *e.g. Barrows v. Jackson,* 346 U. S. 249 (1953). In *Barrows,* this Court stated that Article I, Section 10, is directed at legislative action only:

> " 'It has been settled by a long line of decisions, that the provision of Section 10, article 1, of the federal Constitution, protecting the obligation of contracts against state action, *is directed only against impairment by legislation and not by judgment of courts.* ***' Tidal Oil Co. v. Flanagan, 263 U.S. 444, 44 S. Ct. 197, 198, 68 L.Ed. 382" (Emphasis Supplied).

Interestingly, petitioner cites *Tidal Oil Co. v. Flanagan,* 263 U.S. 444 (1924), at page 11 of its petition, in support of a contrary rule. Yet, in that case, the Supreme Court, distinguishing most of the cases upon which petitioner now relies, such as *Gelpeke v. Dubuque,* 68 U.S. (1 Wall.) 175 (1863); *Douglass v. County of Pike,* 101 U.S. (11 Otto) 677 (1879); and *Rowan v. Runnels,* 46 U.S. (5 How.) 134 (1847), attempts to correct the "persistent error" relative to Article I, Section 10. The Supreme Court explained as follows:

> "These cases were not writs of error to the Supreme Court of a state. They were appeals or writs of error to federal courts where recovery was sought upon municipal or county bonds or some other form of contracts, the validity of which had been sustained by decisions of the Supreme Court of a state prior to their execution, and had been denied by the same court after their issue or making. In such cases the federal courts exercising jurisdiction between citizens of different states

held themselves free to decide what the state law was, and to enforce it as laid down by the state Supreme Court before the contracts were made rather than in later decisions. They did not base this conclusion on article 1, section 10, of the federal Constitution, but on the state law as they determined it, which, in diverse citizenship cases, under the third article of the federal Constitution they were empowered to do. Burges v. Seligman, 107 U.S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359. In such cases, as a general rule, they, in the interest of comity and uniformity, followed the decisions of state courts as to the state law, but, where gross injustice would be otherwise done, they followed the earlier rather than the later decisions as to what it was. *Had such cases been decided by the state courts however, and had it been attempted to bring them here by writ of error to the state Supreme Court, they would have presented no federal question, and this court must have dismissed the writs for lack both of power and jurisdiction.* This is well illustrated by the case of Gelpeke v. Dubuque, 1 Wall. 175, 17 L. Ed. 520, and Railroad Co. v. McClure, 10 Wall. 511, 19 L. Ed. 997. In the former, bonds sued on in the Circuit Court of the United States, were collected under judgment of this court. In the latter, like bonds sued on in a state court were held invalid, and a writ of error to the state Supreme Court was dismissed.

"Other cases cited are Louisiana v. Pilsbury, 105 U. S. 278, 26 L.Ed.1090, and Muhlker v. New York & Harlem R.R. Co., 197 U.S. 544, 25 Sup. Ct. 522, 49 L.Ed. 872, *but in each of them a statute had been passed subsequently* to the contract involved and was held to impair it. In such a case this court accepts the meaning put upon the impairing statute by the state court as authoritative, *but it is the statute as enforced by the state through its courts which impairs the contract, not the judgment of the court*" (Emphasis Supplied). *Tidal Oil Co. v. Flanagan, supra* at 452, 453.

Thus, even if the ruling in *McGillick* could be construed as a holding rather than dicta, it is clear that no impairment

of contracts would exist by the mere reversal of that decision ten years later. The fact is, however, that *County of Allegheny v. Moon Township, supra,* footnote 2, decided in 1969, five years after *McGillick* and which *preceded the enactment of the Parking Tax Ordinance now under consideration,* is directly contrary to the principle for which *McGillick* is cited by petitioner, and is directly on point with regard to the Pennsylvania exemption from taxation of public property used for public purposes.[11] Under these circumstances, there is no substance at all to the belated contentions of petitioner based on Article I, Section 10 of the United States Constitution.

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[11] With respect to the weight to be given to the *McGillick* decision and its *per curiam* affirmance by the Pennsylvania Supreme Court in that case, the Commonwealth Court below stated:

> "The plaintiffs in that case, owners or operators of commercial lots, contended that the ordinance violated the standard of uniformity compelled by Article 9, section 1 of the Pennsylvania Constitution by excluding operators of hotel, tourist court, and trailer park parking lots, and the city and its Parking Authority. After expressing its opinion that the uniformity clause was offended by the 'flat exemption' of the Authority, the county court observed: 'It should be noted that the Parking Authority Law provides that "any property" acquired or used by the Authority for its purpose is exempt from any taxes. We are of the opinion that this does not exempt taxes upon parking transactions which under this ordinance are in the nature of excise taxes as contrasted to property taxes.' The city contends that the affirmance per curiam of the order which accompanied this opinion constituted a holding by the Supreme Court that section 15 of the Public Parking Authority Law provides no exemption from a tax on parking transactions. There are several reasons for disagreeing: first, the sentences relied on were dicta in the lower court's opinion; second, the affirmance by the Supreme Court of the Allegheny County Court's *order* cannot be taken as approval by the former of every statement of law propounded by the latter in support of the order; and, finally, *McGillick* preceded by five years *Allegheny County v. Moon,* which latter case is on point and in direct contradiction of the principle for which the former is cited" (A. 9a, 10a).

Second, there is no evidence to support petitioner's principal contention that it in some manner relied upon the *McGillick* decision in making certain financial decisions. The *McGillick* decision stated nothing more than it was a violation of the uniformity clause of the Pennsylvania Constitution to exclude the Public Parking Authority from the *coverage* of a predecessor parking tax ordinance (A. 26a), but did not even purport to decide the issue of exemption from taxation of public property used for public purposes. For the petitioner to now claim that it relied upon the *per curiam* affirmance of the trial court decision in *McGillick*, aside from its lack of record support, is incredulous. Moreover, there is nothing in the record supporting or tending to demonstrate impairment of petitioner's ability to meet obligations to bondholders.

The total lack of factual support for petitioner's assertions in this case is further found in petitioner's statement at pp. 7, 8 and 22 of the Petition, wherein petitioner asserts that the Authority bonds are guaranteed by the full faith and credit of the City of Pittsburgh, which is the basic premise of petitioner's argument. This assertion is not only unsupported by the record, but is untrue. For example, petitioner, in making this contention, is well aware of specific language in the prospectus for the Parking Authority bond issue for the construction of the May Department Store garage, one of the Respondents here, which reads as follows:

> "Neither the credit nor the taxing power of the City of Pittsburgh or the Commonwealth of Pennsylvania or of any political subdivision thereof will be pledged for the payment of the principal, interest or premium (if any) on the Bonds. The Bonds will not constitute obligations of the City of Pittsburgh or of the Commonwealth of Pennsylvania or of any political subdivision thereof, and neither said City nor said Commonwealth nor any political subdivision thereof will be liable for the pay-

ment of principal, interest or premium (if any) payable upon the redemption of, the Bonds."

Likewise, the assertions set forth on pp. 8 and 9 of the petition, with reference to the use of parking meter funds as well as the inferences and assumptions drawn therefrom, have no foundation anywhere in the record of this case, the purpose and uses of parking meter funds not having been presented to nor considered by the Pennsylvania courts. The same is true of petitioner's statements relative to the deduction of the parking tax from rentals on pages 8 and 9 of the petition. These misleading and inaccurate, as well as unsupported, assertions ignore, for example, the flat rental required under the leases for debt service without any deductions (R. 56a-63a); 105a-109a; 141a-149a; 173a-175a; 217a).

Finally, there is no evidence in the record to support the bald misstatements of petitioner that respondents (1) received "favorable treatment", (2) had "lucrative business arrangements", (3) secured rates fixed at levels sufficient to pass on the parking tax to patrons, or (4) are the recipients of a "windfall". Since no evidence appears in the record in support of these gratuitious and pejorative statements, respondents must conclude that they are designed merely to appeal to emotion and require no direct response.

Conclusion.

Based on the foregoing reasons, it is respectfully requested that this Court deny the petition of the City of Pittsburgh for the issuance of a writ of certiorari to review the decision and order of the Commonwealth Court of Pennsylvania.

Respectfully submitted,

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